Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL R. Q. WOLFSON
Assistant to the Solicitor General

DAVID M. COHEN
DOUGLAS N. LETTER
JEANNE E. DAVIDSON
KATHLEEN MORIARTY MUELLER
ANNE MURPHY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

138PP

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 97-5093

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., DOLORES LEE BURCIAGA, EXECUTRIX OF THE ESTATE OF CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

ORDER

[Feb. 9, 2000]

Before: MAYER, Chief Judge, NEWMAN, Circuit Judge, ARCHER, SENIOR CIRCUIT JUDGE, MICHEL, PLAGER, LOURIE, CLEVENGER, RADER, SCHALL, BRYSON, and GAJARSA, Circuit Judges.

IT IS ORDERED THAT:

The judgment of the court entered on August 5, 1999 be reinstated. The opinion reported at 185 F.3d 1356 (Fed. Cir. 1999) remains in effect as to parts 1 and 2. The opinion of the court en banc issued today supercedes part 3 of that opinion.

PLAGER, Circuit Judge.

On August 5, 1999, this court issued its opinion and judgment in *Hatter* v. *United States*, 185 F.3d 1356 (Fed. Cir. 1999) (*Hatter VII*).[1] In *Hatter VII* we were called upon to review the decision of the Court of Federal Claims regarding the measure of damages to be awarded to the plaintiff judges who had been subjected to a previously-declared, *see Hatter* v. *United States*, 64 F.3d 647 (Fed. Cir. 1995) (*Hatter IV*), unconstitutional diminution in compensation, and to review the ruling by the Court of Federal Claims regarding the application of the statute of limitations to these damages claims, *see Hatter* v. *United States*, 38 Fed. Cl. 166 (1997) (*Hatter VI*).

Subsequently both parties petitioned for rehearing by the panel which issued *Hatter VII*, and, failing that, for rehearing by the court en banc. By Order dated December 20, 1999, we reported the denial of both petitions for rehearing by the panel. With regard to the

[1] The history of this case now involves the following seven decisions: *Hatter* v. *United States*, 21 Cl. Ct. 786 (1990) (*Hatter I*), *Hatter* v. *United States*, 953 F.2d 626 (Fed. Cir. 1992) (*Hatter II*), *Hatter* v. *United States*, 31 Fed. Cl. 436 (1994) (*Hatter III*), *Hatter* v. *United States*, 64 F.3d 647 (Fed. Cir. 1995) (*Hatter IV*), *United States* v. *Hatter*, 519 U.S. 801, 117 S. Ct. 39, 136 L.Ed.2d 3 (1996) (*Hatter V*), *Hatter* v. *United States*, 38 Fed. Cl. 166 (1997) (*Hatter VI*), and *Hatter* v. *United States*, 185 F.3d 1356 (Fed. Cir. 1999) (*Hatter VII*).

petitions for rehearing en banc, the court en banc granted the petition of the appellants, Terry J. Hatter, Jr., et al., and denied the petition of the appellee, the United States. In the Order, the judgment of the court in *Hatter VII* was vacated, and the opinion of the court accompanying the judgment was withdrawn with respect to part 3 thereof.[2]

Part 3 of the court's opinion in *Hatter VII* addressed the statute of limitations issue. The question was whether the moneys wrongfully withheld from the judges' monthly paychecks constituted a "continuing claim," as that term is understood in the jurisprudence of this court. In *Hatter VII*, the court concluded that it did not. After full consideration of the petition by the plaintiffs/appellants and the Government's response, the court en banc concluded that, with regard to the statute of limitations issue, the opinion in *Hatter VII* did not give adequate weight to this court's precedents; accordingly, part 3 of the opinion in *Hatter VII* was withdrawn. Following is the en banc court's opinion and judgment regarding that issue.

* * * * * *

3.

As explained in this court's opinion of August 5, 1999, (*Hatter VII*), the judgment of the trial court must be reversed and the matter must be returned to the Court of Federal Claims for determination of damages consistent with that opinion. There remains a disputed issue that needs resolving regarding the application of the statute of limitations. Under the law, a claim against

[2] The disposition of the vacated judgment in *Hatter VII* is dealt with in a separate Order of the court, issued this date.

the Government for money damages must be filed within six years of the time the claim first accrues. 28 U.S.C. § 2501. Failure to file within the time period imposed by the statute of limitations means that the Government may raise the statute as an affirmative defense. The six years begins to run when the cause of action accrues.

The judges argue that this case is controlled by what is known as the continuing claim doctrine. Under that doctrine, each time moneys are deducted from the judges' pay and paid into the Treasury of the United States, a new cause of action accrues. Thus, any judge whose salary was or is subject to the unconstitutional imposition can file a claim for each deduction within six years from the time the deduction is made; claims for deductions made longer ago than six years from the time suit is filed would be barred.

The Government argued, and the trial court agreed, that the continuing claim doctrine did not apply to this case. On appeal, this court in its August 5th opinion held with the Government, and affirmed that part of the trial court's judgment. *See Hatter VII*, 185 F.3d. at 1363. As we indicated earlier, on further review and after considering appellants' petition for rehearing and the Government's brief in opposition, the court is of the view that the original opinion did not give sufficient weight to our precedents, and that the Government's arguments are unsound in this respect.

In a 1962 seminal opinion, this court's predecessor, the Court of Claims, addressed the question of how to apply the six year statute of limitations to claims against the Government when the claims involve payments from the Government that were to be made in a

series or periodically. *See Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F.2d 381 (1962).[3] Judge Davis, writing for a unanimous court, examined the governing policies and precedents at length, citing over a hundred cases that had been reviewed. Though admitting that not every case was fully consistent in language, and occasionally in outcome, the court identified two basic categories of cases that emerged from its jurisprudence.

The first was those cases in which the repeated government action (or failure to act) resulted in repeated causes of action. The court described those cases as having the following characteristics: (1) the case turned on pure issues of law, or on specific issues of fact which the court was to decide for itself; (2) Congress had not interposed an administrative agency or officer charged with the duty of determining the claimant's eligibility for the money claimed (*i.e.*, there was no discretionary administrative decision at issue), and (3) if fact issues were involved, they were "sharp and narrow." *Id.* 310 F.2d at 384-85.

The cases the court had in mind were the pay cases—those in which the claimant was suing "for additional pay at a higher grade, or claiming greater compensation (under a statute or regulation) than the claimant was receiving, or seeking special statutory increments or allowances, etc." *Id.* at 384. In such a case, when "no administrative agency has been set up to decide the claim, and the court passes de novo on all issues of law and fact—the 'continuing claim' doctrine is

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[3] We are of course bound by the decisions of our predecessor court, until modified or overruled by this court en banc. *See Newell Cos.* v. *Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988).

wholly appropriate and in accord with the general jurisprudence in this country on the statute of limitations." *Id.* at 385. The court went on to note that "[u]nder those general principles the cause of action for pay or compensation accrues as soon as the payor fails or refuses to pay what the law (or the contract) requires; . . . [a]nd where the payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought." *Id.*

The court contrasted those cases with the cases in the second category, cases "in which the cause of action does not accrue until after a determination entrusted by Congress to an administrative official. . . . In those instances, the claim does not accrue until the executive body has acted (if seasonably asked to act) or declines to act." *Id.* The general rule here is that "in appropriate cases conditions precedent to the accrual of a cause of action can be established by statute, contract, or common law, and that where such a condition precedent has been created the claim does not ripen until the condition is fulfilled." *Id.* at 386. The kinds of cases the court listed here typically involved those in which a statute required a demand upon an executive official before payments were due. *See id.* at 386.

As the court saw it, the touchstone between the two categories was that "'continuing claims' . . . are independent of administrative determination[,] and those other claims [are] dependent on prior administrative evaluation." *Id.* at 387. Applying this principle to the case before it, the court concluded that a claim for entitlement to disability retirement pay, of the type requiring discretionary action by a board or executive

official, is not a continuing claim, but accrues as a whole, once it accrues. On the other hand, other types of pay claims not dependent on a discretionary finding—including claims for increased retirement pay because of new legislation, etc.—are continuing claims. *See id.* at 396.

In the case before us, suit was brought not as a class action but on behalf of the individually named judges. In that regard, there are distinct causes of action arising under two different statutes. The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, imposed the Hospital Insurance portion of the Social Security tax on federal judges effective January 1, 1983; the Old Age and Survivors Disability Insurance portion of the Social Security tax was imposed on federal judges by the Social Security Amendments of 1983, Pub. L. No. 98-21, and was effective January 1, 1984.

In both cases, each month after the Acts became effective the Government automatically deducted from the judges' salary checks the amount, calculated by formula, that was due under the tax. No administrative officer or tribunal was given discretion to decide whether the judges were entitled not to pay the tax, or whether the judges had to pay only some of it. The question of whether the monthly tax deduction would occur was determined as a pure issue of law—all judges were to pay; and the only factual issue was to determine the judges' gross salary as provided by Congress from time to time, against which the formula would be applied. Under the analysis given to us by the Court of Claims in *Friedman*, there is merit to the argument of the judges that these periodic deductions, which have

been ruled to have been unlawful, should be treated as a continuing claim.

The Government, in its Opposition to Appellants' Petition for Rehearing En banc, argues that the continuing claim doctrine does not apply since plaintiffs' claims are not inherently susceptible to being divided into a series of independent and distinct wrongs. This is because the continued withholding of these taxes from plaintiffs' judicial salaries "is simply the ongoing 'damages resulting from the single earlier alleged [constitutional] violation by the government.'" Opposition at 4, quoting *Brown Park Estates-Fairfield Dev. Co.* v. *United States*, 127 F.3d 1449, 1457 (Fed. Cir. 1997).

The Government relies heavily on *Brown Park*, as well as another recent case in this court, *Hart* v. *United States*, 910 F.2d 815 (Fed. Cir. 1990). *Brown Park* involved a suit by low-income housing providers against the Department of Housing and Urban Development ("HUD"), alleging breach of their housing assistance payments contract with HUD. The plaintiffs complained that HUD had failed to make rent adjustments in accordance with their contracts. Their main contention was that "HUD has breached its contracts with the Plaintiffs because, in the absence of any comparability studies, it failed to pay full rental adjustments based on the [Automatic Annual Adjustment Factor in the contracts]." *Brown Park* at 1453.

The question on appeal was whether plaintiffs could ward off the bar of the six year statute of limitations by relying on the continuing claim doctrine. This court cited the Court of Claims decision in *Friedman*, and pointed out the distinction drawn there between claims

which fall within the continuing claim doctrine, such as periodic pay claims, and claims which do not. *See id.* at 1456.

In describing the latter category, this court spoke in terms of "a single distinct event, which may have ill effects later on," as a wrong that does not qualify under the continuing claim doctrine. *Id.* Seizing upon that language, and the language above quoted, the Government argues that the imposition of the taxes at issue in 1983 and 1984 constituted such a single distinct event, even though the events continued to have ill effects over the years since.

But that language from *Brown Park* is simply descriptive of the type of case that falls outside the continuing claim doctrine. To determine whether a case falls inside or outside of that description, we return, as we must, to the governing considerations set out in *Friedman*, specifically, has Congress entrusted an administrative officer with the determination of the claimant's entitlement (in *Brown Park* Congress had so entrusted the determination to HUD); does the case involve significant factual determinations, or does it turn on pure issues of law or specific facts which the court is to decide for itself (in *Brown Park* the facts in dispute involved complex calculations of area market rents that were within the expertise of HUD); and does the case call upon the court to address broad concepts rather than resolve sharp and narrow factual issues (*Brown Park's* resolution turned on such issues as the "material differences between the rents charged for assisted and comparable unassisted units"). This court concluded, consistent with governing precedent, that *Brown Park* did not involve a continuing claim for

statute of limitations purposes; the case thus lends no support to the Government's case here.

Similarly, the other case on which the Government places heavy reliance, *Hart* v. *United States*, is inapposite. *Hart* involved a claim by the widow of a retired military member, in which she alleged that her deceased husband's election not to participate in the survivors benefit program was invalid because she had not been given notice as required by statute. She sued for annuity benefits, but filed her claim more than six years after her husband's death, the event under which her entitlement vested.

This court held that "[b]ecause all events necessary to her benefits claim had occurred when her husband died, we conclude that plaintiff's claim for . . . annuity benefits is not a 'continuing' claim." *Hart*, 910 F.2d at 818. Again, it is readily apparent that this was a case in which Congress has charged an administrative agency with making a determination whether she qualified for an annuity, and how much, and the case did not turn on an issue of law but on disputed facts as to whether and when she received notice. The court correctly discerned that under the *Friedman* precedent, this case fell over the line into the second category, that of non-continuing claim cases.

Neither *Brown Park* nor *Hart* questioned the authority of *Friedman*, nor could they, since neither was decided by this court en banc. We find the analysis provided by Judge Davis in the *Friedman* opinion to be a useful and effective mechanism for distinguishing between cases when the Government has failed to make a series of payments claimed to be due (or, as here, has deducted or withheld pay), and the question is whether

there is a seminal event that constitutes one cause of action, or whether each wrongful deduction or refusal to pay constitutes a separate cause of action. Statements such as "all necessary events had occurred," or "the claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs," may be accurate ways of describing the events after-the-fact, but they do not contribute to the analysis. The Government's reliance on such statements, rather than focusing on the *Friedman* factors, leaves us unpersuaded that the Government's view should prevail. We conclude that, for the reasons stated above, the case before us falls comfortably on the side of the line governed by the continuing claim doctrine.

CONCLUSION

The judgment of the trial court with regard to the application of the statute of limitations issue must be, and is, reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES CLAIMS COURT

No. 705-89 C

TERRY J. HATTER, JR., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Nov. 9, 1990]

OPINION AND ORDER

TURNER, Judge.

Plaintiffs are ten Article III* federal judges serving on various United States district courts and on one United States court of appeals. They bring this action pursuant to U.S. Const. art. III, § 1 (Compensation Clause) claiming that their compensation has been diminished by reason of the Social Security Amendments of 1983, Pub. L. 98-21, § 101, 97 Stat. 65, 68 (codified as

* The designation stems from Article III, Section 1, of the United States Constitution which provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, *receive or their Services a Compensation, which shall not be diminished during their Continuance in Office.* [Emphasis added.]

amended in scattered sections of 26 U.S.C. and 42 U.S.C.). Plaintiffs seek damages in the amount of the Social Security taxes withheld from their salaries from January 1, 1984 to the present.

Defendant filed a motion to dismiss the complaint pursuant, *inter alia*, to RUSCC 12(b)(1). It alleges that this a tax refund suit over which the Claims Court currently lacks subject matter jurisdiction because the plaintiffs failed to file an administrative claim for refund with the Internal Revenue Service as required by 26 U.S.C. § 7422(a). Hearing concerning defendant's motion was conducted on November 9, 1990 in Washington, D.C.

For reasons stated below, we conclude that the Claims Court lacks subject matter jurisdiction over the complaint at this time. Although plaintiffs characterize their claims as ones for damages other than a tax refund, we conclude that, in essence, their claims are for tax refunds which much be brought first before the IRS. 26 U.S.C. § 7422(a).

I

Prior to January 1, 1984, the salaries of Article III judges were not subject to withholding for Social Security taxes. Effective January 1, 1984, Congress amended the Social Security Act, 42 U.S.C. § 401(a)(5)(E) (1988), and the Internal Revenue Code of 1954, 26 U.S.C. § 3121(b)(5)(E) (1988), extending Social Security coverage to many previously exempt civilian government employees, including judges of the United States district courts and courts of appeals. Pursuant to this statute, the plaintiffs in this case had the

following amounts withheld from their salaries during the years 1984 through 1989:

Year	*Amount Withheld*
1984	$2,532.60
1985	$2,791.80
1986	$3,003.00
1987	$3,131.70
1988	$3,379.50
1989	$3,604.80

All of the plaintiffs were appointed and took office prior to January 1, 1984, the effective date of the amendments. At the time of their respective appointments, the only mandatory deductions from their salaries were for federal and state income taxes. No mandatory deductions were made for retirement or for Social Security benefits. Plaintiffs now seek to recover as damages the amounts withheld for Social Security taxes.

II

Title 26 U.S.C. § 7422(a) provides in pertinent part:

> *No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. [Emphasis added.]*

Plaintiffs concede that if the court determines that their claims are for tax refunds, then they must file an administrative refund claim with the IRS before suit may be brought in this court. *See* 26 U.S.C. § 7422(a). They argue, however, that this is not a tax refund suit but rather a claim for damages based on the diminution in compensation caused by withholding the Social Security tax from their salaries. To support their position, plaintiffs rely on the Court of Claims opinion in *Atkins* v. *United States*, 556 F.2d 1028, 214 Ct. Cl. 196 (1977), *cert. denied*, 434 U.S. 1009, 98 S. Ct. 718, 54 L.Ed. 751 (1978). They argue that since, according to *Atkins*, the court would have great flexibility in fashioning a remedy for a violation of the Compensation Clause, their claim is somehow distinguished from an ordinary tax refund suit. Plaintiffs argue that the court could provide a remedy by awarding damages or by ordering an appropriate increase in their salaries to counteract the effect of the Social Security deductions. The possibility of alternative relief, according to plaintiffs, demonstrates that defendant's characterization of their claim as one for a tax refund is mistaken.

Defendant argues that this is a tax refund suit, relying primarily on the Court of Claims opinion in *King* v. *United States*, 390 F.2d 894, 896, 182 Ct. Cl. 631, 633-34 (1968), *rev'd on other grounds*, 395 U.S. 1, 2, 89 S. Ct. 1501, 1501-02, 23 L.Ed.2d 52 (1969). In *King*, the plaintiff was a retired Army colonel who claimed that by misclassifying his armed services retirement status, the government caused him to pay federal income taxes

which he was not legally obligated to pay. King asserted that he should be allowed to maintain his claim even though he had not filed a refund claim with the IRS. The Court of Claims held that this monetary claim was barred because he did not file an administrative refund claim but granted him relief in the form of a declaratory judgment and was later reversed on this ground. 395 U.S. at 5, 89 S. Ct. at 1503.

Although *King* did not involve a diminution claim based on the Compensation Clause, we conclude that it is more analogous to the present case than *Atkins*. Plaintiffs attempt to distinguish their case from *King* on the ground that, unlike *King*, they do not challenge the government's authority to deduct Social Security contributions from their wages. Plaintiffs argue that if they are legally obligated to pay the Social Security taxes, then the diminution which results must be rectified. Putting aside semantics, we find that this is a tax refund suit. Like the plaintiff in *King*, plaintiffs here are asserting that they should be allowed to maintain their claim in this court even though they have not filled a refund claim with the IRS. For jurisdictional purposes, plaintiffs' position is identical to the plaintiff in *King* and we find it controlling.

The fact that the plaintiffs in *Atkins* brought a claim for damages is of no help to the plaintiffs in this case. The claim in *Atkins* was for a violation of the Compensation Clause based on alleged diminution in salary caused by inflation and by the failure of Congress to raise judicial salaries. Since *Atkins* did not involve alleged diminution by taxation, it did not present a jurisdictional problem for the court similar to the one addressed in *King*.

The issue of whether taxes withheld from Article III judicial salaries constitute a diminution in violation of the Compensation Clause is not new. It was first brought before the United States Supreme Court in 1920 in a case involving income taxes. *Evans* v. *Gore*, 253 U.S. 245, 40 S. Ct. 550, 64 L.Ed. 887 (1920). Thereafter, each time the "diminution" issue has arisen in the context of income taxes, the claim originated as one against the IRS. *See Miles* v. *Graham*, 268 U.S. 501, 45 S. Ct. 601, 69 L.Ed. 1067 (1925), *overruled by O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939). In *O'Malley*, the Supreme Court described the suit below as "an action at law to recover a tax on income claimed to have been illegally exacted." 307 U.S. at 278, 59 S. Ct. at 838. The Court further noted that the suit had been brought against the Collector of Internal Revenue and the plaintiff's claim for refund had been rejected. 307 U.S. at 279, 59 S. Ct. at 838-39.

None of the claims for violation of the Compensation Clause brought after *O'Malley* was based on taxes. *See United States* v. *Will*, 449 U.S. 200, 101 S. Ct. 471, 66 L.Ed.2d 392 (1980); *Duplantier* v. *United States*, 606 F.2d 654 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076, 101 S. Ct. 854, 66 L.Ed.2d 798 (1981); *Atkins* v. *United States*, 556 F.2d 1028, 214 Ct. Cl. 186 (1977), *cert. denied*, 434 U.S. 1009, 98 S. Ct. 718, 54 L.Ed.2d 751 (1978).

We conclude that there is no logical reason to view a claim for diminution based on Social Security taxes differently from one based on income taxes. In order to obtain a refund of either, the claim must be brought before the IRS prior to filing a complaint in this court. Manifestly, however, artfully characterized, plaintiffs

seek recovery of Social Security taxes which have been deducted from their salaries since January 1, 1984. Based on the Supreme Court's interpretation of diminution claims involving income taxes as claims for a tax refund rather than damages, the Court of Claims opinion in *King*, and the face of 26 U.S.C. § 7422(a), we conclude that plaintiffs' claims are for tax refunds over which this court lacks subject matter jurisdiction at this time.

III

Defendant's motion to dismiss filed on May 15, 1990, to the extent that it asserts this court's current lack of jurisdiction, *see* RUSCC 12(b)(1), is GRANTED. It is ORDERED that judgment be entered dismissing the complaint for lack of jurisdiction.

Each party shall bear its own costs. *See Johns-Manville Corp.* v. *United States*, 893 F.2d 324, 328 (Fed. Cir. 1989) ("the Claims Court has no power to award costs in cases over which is has no . . . jurisdiction").

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 91-5039

JUDGE TERRY J. HATTER, JR., JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON JUDGE RAUL A. RAMIREZ AND CHIEF JUDGE THOMAS A. WISEMAN, JR., PLAINTIFFS-APPELLANTS

v.

THE UNITED STATES, DEFENDANT-APPELLEE

[Filed: Jan. 16, 1992]

Before: ARCHER, PLAGER and RADER, Circuit Judges.

RADER, Circuit Judge.

Terry J. Hatter, Jr., et al., life-tenured federal judges, appeal the dismissal of their complaint by the United States Claims Court. *Hatter* v. *United States*, 21 Cl. Ct. 786 (1990). The judges allege that imposition of social security taxes diminished their compensation in violation of the United States Constitution. The Claims Court dismissed their complaint for lack of jurisdiction. Because the Tucker Act gives the Claims Court jurisdiction over claims of salary diminution under Article III of the Constitution, this court reverses and remands.

BACKGROUND

In 1983, Congress passed the Social Security Amendments of 1983. *See* 42 U.S.C. § 410(a)(5)(C)-(G) (1988). This Act extended social security coverage to many Government employees, including federal court of appeals and district court judges.* Previously, federal judges were exempt from paying social security taxes.

On January 1, 1984, the Social Security Amendments imposed Federal Insurance Contributions Act ("FICA") taxes on federal judges. From 1984 to 1989, plaintiffs each paid the following amounts in FICA taxes:

YEAR	TAX
1984	$2,532.60
1985	$2,791.80
1986	$3,003.00
1987	$3,131.70
1988	$3,379.50
1989	$3,604.80

On December 29, 1989, plaintiffs filed a complaint in the Claims Court. In count I, plaintiffs contend that the 1983 Amendments "unlawfully diminished and continues to diminish plaintiffs' compensation in violation of Article III, Section 1, of the Constitution of the

* No member of this panel was an Article III judge in 1984. Therefore, no panel member suffered an alleged diminution in salary when the 1983 Amendments took effect.

United States." Under this count, plaintiffs sought monetary damages to compensate for their diminished wages. Count II claims that plaintiffs have an employment contract with the Government which protects them against diminishment of their compensation. Again, plaintiffs seek damages for breach of contract.

The Government moved to dismiss the complaint for lack of jurisdiction because plaintiffs did not file an administrative claim for a tax refund. *See* 26 U.S.C. § 7422(a) (1988). The Claims Court granted the Government's motion. Plaintiffs appealed.

DISCUSSION

This court must decide whether appellants have stated a case within the Claims Court's jurisdiction under 28 U.S.C. § 1491 (1988) (Tucker Act). Under the Tucker Act, the United States has waived sovereign immunity for suits in the Claims Court:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1).

The Tucker Act alone, however, does not create a substantive right to collect money damages from the United States. *United States* v. *Testan*, 424 U.S. 392, 398, 96 S. Ct. 948, 953, 47 L.Ed.2d 114 (1976); *Eastport*

S.S. v. *United States*, 372 F.2d 1002, 1007-1009, 178 Ct. Cl. 599 (1967). Rather, the Act empowers the Claims Court to award damages for the violation of substantive rights embodied in the Constitution, federal statutes, executive regulations, or federal contracts. *United States* v. *Mitchell*, 463 U.S. 206, 216-17, 103 S. Ct. 2961, 2967-68, 77 L.Ed.2d 580 (1983).

Thus, to invoke Tucker Act jurisdiction, claimants must show that their claim arises under an independent source of federal law. Moreover, the federal law or contract, fairly interpreted, must provide a damages remedy for violations. *Id.* In sum, appellants must show their claim arises from a federal constitutional, statutory, regulatory, or contractual provision that provides damages its breach.

Appellants base their Tucker Act claim on Article III, Section 1, of the United States Constitution:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. III, § 1. Appellants thus invoke the Constitution as an independent source of federal law providing for the payment of money.

This provision of the Constitution, fairly interpreted, mandates the payment of money in the event of a prohibited compensation diminution. This provision states, in mandatory and unconditional terms, that judges' salaries "shall not be diminished during their Continuance in Office." This language presupposes damages

as the remedy for a governmental act violating the compensation clause. Only a timely restoration of lost compensation would prevent violation of the Constitution's prohibition against diminution of judicial salaries.

Thus, the Constitution mandates that federal judges must receive, "during their Continuance in Office," compensation for their services which may not be less than their compensation upon assuming office. In the event of a violation of this clause, the Constitution itself provides a remedy—compensation. In sum, by forbidding any diminution of judicial compensation, the Constitution itself requires repayment of prohibited reductions in compensation to Article III judicial officers.

The history of the compensation clause supports this court's reading that a violation of the clause mandates repayment or compensatory damages. According to James Madison's notes, the delegates to the Philadephia Convention discussed the compensation clause on July 18, 1787. 2 Max Farrand, *The Records of the Federal Convention of 1787*, 44-45 (1911). Gouverneur Morris proposed wording the compensation clause to prevent "any improper dependence in the Judges." *Id.* James Madison, in response, shared Morris's view that the Constitution should reduce any dependence by the judicial branch on the other branches for compensation. *Id.* at 45. Alexander Hamilton, too, explained the compensation clause:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in

> practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.

The Federalist No. 79, at 472 (Alexander Hamilton) (emphasis in original) (Clinton Rossiter ed., 1961). These framers of the Constitution shared a common vision of the undiminishable compensation clause.

These observations by the framers of the compensation clause underscore its importance to the preservation of judicial independence in a system of separated powers. These comments also suggest that judicial officers deprived of full compensation need not rely on legislative or executive action for a remedy. To require further legislative or executive actions to enforce the compensation clause would frustrate Article III's purpose of judicial independence. The purpose of Article III, § 1, as well as its language, embraces a self-executing compensatory remedy.

The Supreme Court has also considered whether an alleged violation of the compensation clause provides Tucker Act jurisdiction. *United States* v. *Will*, 449 U.S. 200, 101 S. Ct. 471, 66 L.Ed.2d 392 (1980). In *Will*, several federal judges sought review of four statutes purporting to stop or reduce cost-of-living increases for judges. The Court concluded that two of the four statutes purported to roll back judicial salary increases already in effect. These statutes violated Article III, § 1. *Id.* at 226, 230, 101 S. Ct. at 486, 488. Any legislative attempt to rescind those effective salary increases would diminish judges' compensation. The Court upheld the other two statutes because they affected salary increases not yet in effect. *Id.* at 229,

101 S. Ct. at 487. Therefore, those two statutes did not diminish judicial salaries. The case was remanded to the trial court to determine money damages. *Id.* at 230-31, 101 S. Ct. at 488.

To reach these substantive results, the Court necessarily examined the jurisdiction of the trial courts to enforce the compensation clause. The Court stated that both the Court of Claims, the predecessor to the Claims Court's trial jurisdiction, and district courts had jurisdiction to determine whether the four statutes violated Article III, § 1. The Court stated:

> [T]here is no doubt whatever as to this Court's jurisdiction under 28 U.S.C. § 1252 or that of the District Court under 28 U.S.C. § 1346(a)(2) (1976 ed., Supp. III).

Id. at 210-11, 101 S. Ct. at 478 (footnote omitted). "Jurisdiction being clear," *id.* at 211, 101 S. Ct. at 479, the Court proceeded to the next inquiry.

The Court felt jurisdiction was "clear" based on 28 U.S.C. § 1346(a)(2). In a footnote, the Court explained:

> This provision confers on the district courts and the Court of Claims concurrent jurisdiction over actions against the United States based on the Constitution when the amount in controversy does not exceed $10,000.

Id. at 211, n. 10, 101 S. Ct. at 478, n. 10. Section 1346(a)(2) of title 28, also known as the Little Tucker Act, mirrors the Tucker Act. It provides district courts concurrent jurisdiction with the Claims Court to handle claims against the United States, "not exceeding

$10,000 in amount, founded either upon the Constitution, or any Act of Congress." The Supreme Court found jurisdiction in the district court for the *Will* plaintiffs under the Little Tucker Act.

The only jurisdictional difference between the appellants in *Will* and the plaintiffs in this case is the amount in controversy. Plaintiffs in this case seek more than $10,000 in damages. The Supreme Court found jurisdiction under the Little Tucker Act in the district court for the *Will* plaintiffs. The Tucker Act provides jurisdiction in the Claims Court for the plaintiffs in this case.

The Claims Court erred by recharacterizing plaintiffs' action as solely a request for a tax refund. Plaintiffs' complaint sought damages for violation of the compensation clause. Nonetheless, the Claims Court read their claim as a tax refund suit. The Claims Court erred by imposing a single legal theory on the plaintiffs' complaint.

The Federal Rules of Civil Procedure permit parties to pursue their claim on any viable legal theory. Fed. R. Civ. P. 8(e)(2). In this case, plaintiffs could have pursued a tax refund. If they had, as the Claims Court noted, title 26 would have required a prior administrative claim. *See*, 26 U.S.C. § 7422(a). Plaintiffs, however, did not pursue a tax refund. Instead they sought damages for violation of Article III, § 1—an action which is within the Tucker Act jurisdiction of the Claims Court.

By requiring prior filing of an administrative claim with the Internal Revenue Service for a compensation clause violation, the Claims Court overlooked the language and purpose of Article III, § 1. Conditioning redress of an alleged compensation clause breach on executive branch actions would frustrate the purpose of Article III, § 1. The Constitution provides a compensatory remedy without need for reliance on other branches.

The Claims Court based its recharacterization of plaintiffs' action on two cases, *O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939), and *King* v. *United States*, 390 F.2d 894, 182 Ct. Cl. 631 (1968), *rev'd on other grounds*, 395 U.S. 1, 89 S. Ct. 1501, 23 L.Ed.2d 52 (1969). In *O'Malley*, the plaintiffs challenged the validity of federal income taxes because withholding revenues allegedly diminished federal judges' salaries. The Court determined that Article III did not bar Congress from imposing a non-discriminatory income tax on federal judges. *O'Malley*, 307 U.S. at 282, 59 S. Ct. at 840. *O'Malley*, however, does not affect the jurisdiction of the Claims Court. Contrary to the Claims Court's statement, *Hatter*, 21 Cl. Ct. at 789, the Supreme Court did not recast *O'Malley's* plaintiffs' diminution claims as tax refund actions. The *O'Malley* plaintiffs elected to sue the Collector of Internal Revenue for a refund, rather than seeking damages. The *O'Malley* plaintiffs' election in the 1930s, however, hardly binds the *Hatter* plaintiffs in the 1990s. As noted earlier, the Tucker Act provides plaintiffs an independent action for damages based on a purported violation of Article III, § 1.

By improperly recharacterizing plaintiffs' action, the Claims Court also foreclosed an issue to be determined on the merits. *O'Malley* determined that federal income taxes do not have a discriminatory impact on

federal judges. Plaintiffs have had no opportunity to demonstrate whether the social security tax is discriminatory. The Claims Court erred in foreclosing this issue without full consideration of the merits. On remand, the Claims Court will have an opportunity to examine whether social security taxes have a discriminatory effect on federal judges.

The Claims Court also erred in viewing *King* as identical to this case for jurisdictional purposes. *Hatter*, 21 Cl. Ct. at 788. King was an Army Colonel who claimed that he had paid too much federal income tax because the Government misclassified his retirement status. The Court of Claims dismissed Colonel King's tax refund claim for failure to file a prior administrative claim with the Internal Revenue Service. *King*, 390 F.2d at 896. In equating the *Hatter* plaintiffs with Colonel King, the Claims Court overlooked pertinent distinctions.

First, plaintiffs in this case have an independent jurisdictional basis for their claim. Colonel King had no choice except to seek a tax refund. Second, unlike Colonel King, plaintiffs here do not challenge the United States' authority to impose a tax. Plaintiffs merely seek compensation to ensure that imposition of a tax does not diminish their salary. In sum, plaintiffs do not seek tax refunds, but compensation to ensure compliance with Article III, § 1. The Tucker Act provides the Claims Court jurisdiction to adjudicate this action.

CONCLUSION

Appellants' claim for relief states a claim within the jurisdiction of the Claims Court. Therefore, the decision of the Claims Court is reversed and this case is remanded for a hearing on the merits.

REVERSED AND REMANDED.

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

No. 705-89 C

JUDGE TERRY J. HATTER, JR., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 22, 1994]

OPINION AND ORDER

TURNER, Judge.

This opinion addresses plaintiffs' motion for summary judgment filed September 2, 1993 and defendant's cross-motion for summary judgment filed October 1, 1993. Oral argument was heard on November 16, 1993. The parties agree that there are no material disputed facts. We conclude that defendant's cross-motion should be granted.

I

Plaintiffs are federal district and circuit court judges who took office prior to January 1, 1983. On that date, all federal judges for the first time became subject to the Hospital Insurance (Medicare) portion of the Social Security tax. Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, § 278(a) 96 Stat. 324, 559 (1982) (codified as amended at 26 U.S.C. (I.R.C.) § 3121(u)

(1988)). One year later, judges became subject to the Old Age Survivors and Disability Insurance portion of the Social Security tax, and since January 1, 1984, all federal judges have been fully subject to Social Security taxes. Social Security Amendments of 1983, Pub. L. No. 98-21, § 101(a)(1), (b)(1) and (d), 97 Stat. 65, 68, 69 (codified as amended at 26 U.S.C. (I.R.C.) § 3121(b)(5)(E) (1988) and 42 U.S.C. § 410(a)(5)(E) (1988)). Social Security taxes have therefore been duly withheld from plaintiffs' monthly compensation since the effective dates of these acts.

Plaintiffs all serve pursuant to Article III of the Constitution, which in pertinent part provides that federal judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1 (hereafter the "Compensation Clause").

Plaintiffs contend that because they were already judges when the withholding of Social Security taxes from their pay began, their compensation was diminished in violation of the Compensation Clause. In the alternative, plaintiffs claim a contract right to undiminished compensation. Plaintiffs seek a refund of all Social Security taxes collected thus far.

After a review of Compensation Clause law in part II, we consider plaintiffs' four main constitutional arguments in part III, and then address plaintiffs' contract claim in part IV.

II

A

An income tax on judges was first imposed in 1862 and was collected for several years. Act of July 1, 1862, ch. 119, § 86, 12 Stat. 432, 472 (1862). This law occasioned the Supreme Court's first pronouncement on the constitutionality of taxing judges. It came as an extraordinary 1863 protest against the tax issued in the form of a letter from Chief Justice Taney to the Treasury Secretary. This remarkable document, officially recorded and published by the Court[1] and resembling nothing so much as an unsolicited advisory opinion, was echoed several years later by an opinion from the Attorney General that the income tax was unconstitutional as applied to judges. 13 Op.A.G. 161 (1869). As a consequence, all taxes which had been collected on judicial compensation were refunded in 1873. *Wayne* v. *United States*, 26 Ct. Cl. 274, 290, 1800 WL 1765 (1891). But these two seemingly non-binding opinions had an even more powerful effect: the courts came to consider the matter of judicial taxation closed without ever actually addressing the issue. *E.g.*, *Wayne*, 26 Ct. Cl. at 290.

The courts finally addressed the matter when, subsequent to ratification of the 16th Amendment in 1913,[2]

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[1] The letter is found at 157 U.S. 701. There was a 22-year lapse between the 1863 order of the Court recording the letter and its publication.

[2] "The Congress shall have power to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several states, and without regard to any census or enumeration." U.S. Const. amend. XVI (emphasis added).

Congress in 1919 made its second serious attempt to tax federal judges. Revenue Act of 1918, ch. 18, § 213, 40 Stat. 1057, 1065 (1919). Thus the first Compensation Clause case of precedential significance does not appear until *Evans* v. *Gore*, 253 U.S. 245, 40 S. Ct. 550, 64 L.Ed. 887 (1920). In *Evans*, a federal judge who had taken office in 1899 challenged the Revenue Act of 1918, arguing that the income tax was an unconstitutional diminution of his salary.

Over a vigorous dissent by Justice Holmes, joined by Justice Brandeis, the Court agreed with the plaintiff judge, holding that an income tax on judges was an impermissible diminution in compensation, and that the Compensation Clause continued to prohibit taxation of judicial salaries even after the 16th Amendment. Holmes's position in dissent, since adopted by the Court as will be seen, was that an income tax on judges would be valid so long as it did not single out judicial compensation but rather applied with like force to the income of all citizens. 253 U.S. at 264-267, 40 S. Ct. at 557-558.

The taxing authorities refused to give in so easily. In *Miles* v. *Graham*, 268 U.S. 501, 45 S. Ct. 601, 69 L.Ed. 1067 (1925), the government sought to limit the *Evans* rule, arguing that the tax protection of the Compensation Clause shielded only judges appointed before the tax became law (hereafter "prior judges").[3] According to the government, prior judges stood in contrast to judges taking office after the tax (hereafter "new judges"): taxation would not diminish the compensation

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[3] Plaintiffs here are all prior judges, since they took office before the Social Security tax extended to the judiciary.

of new judges, since they would never have received their salary untaxed. In *Miles*, the plaintiff was a new judge who argued, in essence, that the Compensation Clause's protection extended to judicial compensation as an entity or institution, without regard to whether the recipient judge took office before or after enactment of the tax.

The Court in *Miles* agreed with the plaintiff, firmly rejecting the government's attempt to limit the *Evans* tax exemption to prior judges. (Brandeis, but not Holmes, dissented without comment.) Relying heavily on *Evans*, *Miles* made explicit the simple rule inferable from *Evans*: under the constitution, all judicial compensation provided for by Congress was tax-free. 268 U.S. at 509, 45 S. Ct. at 602.

In a familiar pattern, it was not long before the initially rejected Holmes-Brandeis formulation (calling for judicial salary to be treated the same for tax purposes as income earned by any citizen) was, in effect, adopted by the Court. This development came after Congress in 1932 made its third attempt to tax the judiciary, imposing another income tax limited to new judges. Revenue Act of 1932, ch. 209, § 22(a), 47 Stat. 169, 178 (1932). Predictably, a new judge challenged this tax based on the rule of *Miles*. *O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939) (Frankfurter, J.).

For the tax collectors, the third time proved the charm: the Court reversed course, issuing its first rejection of a judge's Compensation Clause challenge to a tax. The Court held that judicial compensation could be taxed, approving Congress's "position that a nondiscriminatory tax laid generally on net income is

not . . . a diminution [of a federal judge's] salary within the prohibition" of the Compensation Clause. 307 U.S. at 282, 59 S. Ct. at 840. According to the Court, the constitution did not excuse judges from the obligations of citizenship. *Id.* *O'Malley* left *Miles* effectively overruled.[4]

Justice Frankfurter in *O'Malley* also sharply criticized *Evans*, but in a characteristic exercise of judicial restraint was careful to note that only the question of tax immunity for new judges was properly at bar, whereas the plaintiff in *Evans* had been a prior judge. *O'Malley*, 307 U.S. at 281-82, 59 S. Ct. at 839-40. As will be seen, *O'Malley* remains the most important precedent in the area of taxation of federal judges.

A generation after *O'Malley*, the Court of Claims[5] thoroughly reviewed Compensation Clause law in *Atkins* v. *United States*, 214 Ct. Cl. 186, 556 F.2d 1028 (1977) (en banc), *cert. denied*, 434 U.S. 1009, 98 S. Ct. 718, 54 L.Ed.2d 751 (1978). This review was occasioned by the suit of a group of federal judges who claimed that their compensation, though nominally unchanged

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[4] The court's language is to some degree unclear as to the fate of *Miles*: "But to the extent that what the Court now says is inconsistent with what was said in *Miles* v. *Graham*, 268 U.S. 501, 45 S. Ct. 601, the latter cannot survive." 307 U.S. at 282-83, 59 S. Ct. at 840.

[5] In 1982 the Court of Claims and the Court of Customs and Patent Appeals were abolished. Judges of those two courts became judges on the new Court of Appeals for the Federal Circuit. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, tit. I, § 165, 96 Stat. 25, 50 (1982) (codified as amended at 28 U.S.C. § 44 (1988)). Court of Claims decisions constitute precedent for this court to the same extent as decisions of the Federal Circuit. *South Corp.* v. *United States*, 690 F.2d 1368 (Fed. Cir. 1982).

since 1969, had in fact been unconstitutionally eroded by inflation. In rejecting this claim, the Court of Claims gave valuable guidance on the import of *O'Malley* and its predecessors.

In analyzing the Supreme Court's holding in *O'Malley*, the Court of Claims in Atkins stated that both *Evans* and *Miles* are "no longer good law," *id.*, 214 Ct. Cl. at 213, 556 F.2d at 1043. According to the Court of Claims, *O'Malley* "overruled *Miles*, and by force of reasoning overruled a good deal of *Evans*," *id.* at 215, 556 F.2d at 1044.[6]

Atkins fleshes out the distinction between indirect and direct diminution first alluded to by the Supreme Court in *Evans*, 253 U.S. at 254, 40 S. Ct. at 553. A direct diminution is a reduction in the number of dollars authorized by Congress for a judge's salary, while an indirect reduction, for instance "by virtue of a tax," lowers the take-home pay of a judge but not the statutory salary. *Atkins*, 214 Ct. Cl. at 215, 556 F.2d at 1044. Given that "the purpose of the Compensation Clause is to preclude a financially based attack on judicial independence," *id.* at 222, 556 F.2d at 1048, cases of indirect diminution are to be handled differently from cases of direct diminution. The Court of Claims explained that while the Supreme Court's Compensation Clause cases uniformly agreed that direct diminutions were always prohibited, after *O'Malley* "[i]ndirect, nondiscriminatory diminishments [like taxes] . . . which do not amount to an assault on the

[6] Also interesting in this regard is Justice Butler's dissent in *O'Malley* itself, which states that the majority in *O'Malley* "intend [ed] to destroy the decision in *Evans* v. *Gore*." 307 U.S. at 297, 59 S. Ct. at 846.

independence of the third branch . . . [are not prohibited by] the Compensation Clause," *id.* at 216, 556 F.2d at 1045.

The 1977 *Atkins* decision is in full accord with the later Supreme Court Compensation Clause case of *United States* v. *Will*, 449 U.S. 200, 101 S. Ct. 471, 66 L.Ed.2d 392 (1980), which dealt with a direct diminution. In *Will*, scheduled increases in judicial, congressional, and top-level executive pay were withdrawn for four years running, twice just before the raises took hold, and twice just after. Upon a suit by federal judges, the Court held that while the political branches may cancel a prospective judicial salary increase, any increase allowed to become effective even for less than a day is permanent for Article III judges. 449 U.S. at 224-26, 101 S. Ct. at 485-486.

The *Will* decision buttresses the implication of the Court of Claims in *Atkins* that all direct reductions of judicial compensation are invalid regardless of congressional intent: speaking of direct diminutions, the Court said "the Constitution makes no exceptions for 'nondiscriminatory' reductions." 449 U.S. at 226, 101 S. Ct. at 486. As to indirect diminutions, not at issue in *Will*, the Court was not quite so clear. Still, *Will* gives some guidance on indirect diminutions like taxes: the Court discussed *O'Malley* with apparent approval, noting that *O'Malley* validated income taxation of judicial salaries and "recognized that the Compensation Clause does not forbid everything that might adversely affect [the finances of] judges." *Id.* at 227 n.31, 101 S. Ct. at 486 n. 31. In fact, *Will* may have left open the possibility that even a congressional intent to pressure the judiciary might not invalidate an indirect diminution: "[w]e need

not address the question of whether evidence of an intent to influence the Judiciary would invalidate a statute that on its face does not directly reduce judicial compensation." *Id.* at 226 n. 30, 101 S. Ct. at 486 n. 30.[7] Of course, in the absence of facts showing bad legislative intent, this legal question is moot. *Atkins*, 214 Ct. Cl. at 216, 228, 235, 556 F.2d at 1045, 1051, 1055.

B

The following two rules and one corollary emerge from the foregoing review of the Compensation Clause case law.[8] First, direct diminution of the salary authorized for federal judges is absolutely forbidden, no matter how innocent the intent of Congress is. Second, so-called indirect diminishments, and specifically income taxes, are permissible even if they result in a reduction in take-home pay for federal judges, at least so long as they are not part of an assault on judicial independence. This rule's corollary is that if there is no evidence of legislative intent to influence the judiciary,

[7] The Court of Claims, albeit also in *dicta*, took a firmer stand on this issue, indicating that an indirect diminution which discriminated against judges would be remediable by the courts. *Atkins*, 214 Ct. Cl. at 222-23, 556 F.2d at 1048.

[8] *Atkins* as it applies to this case is primarily *dicta*, since *Atkins* dealt with the impact of inflation on judicial buying power rather than with an impact caused by congressional action. *Will* is likewise not on all fours here, dealing as it does with a direct diminution rather than a tax. *O'Malley*, however, is almost directly on point, with the only arguable distinction being that it does not overtly deal with the problem of taxation of prior judges. Still, as we demonstrate, the dicta from *Atkins* and *Will*, read together with the all-important holding in *O'Malley*, form a consistent and common-sensical body of law governing the instant case.

taxes of general applicability are valid as to Article III judges.

Thus the question in this case is not whether the plaintiffs' compensation has been reduced by Social Security taxes, for at least in terms of take-home pay it has been, but rather whether this indirect reduction is of the type forbidden by the Compensation Clause.[9] As will be shown below, under *O'Malley* and subsequent cases, the answer is no.

III

As to the Compensation Clause claims, (Second Am.Cplt. Counts I-II at 7-8), four basic themes, some of them related, emerge from plaintiffs' briefs and oral argument. First, plaintiffs contend that in overruling *Miles* but not *Evans*, the Supreme Court meant to limit the original broad holding of *Evans* to the following still vital rule: "[E]ven a tax of general applicability cannot be imposed upon [prior] judges who were appointed

[9] For the purpose of resolving the motions at bar, we accept plaintiffs' assumption that inclusion in Social Security represents a reduction in judicial pay. But this proposition is by no means settled. If plaintiffs were to prevail in this litigation, and all affected judges were effectively taken out of Social Security and refunded their Social Security taxes, Compensation Clause claims by judges who felt their compensation had been decreased would surely result. For instance, though plaintiffs here claim Social Security coverage *reduces* their compensation, in *Robinson* v. *Sullivan*, 905 F.2d 1199 (8th Cir. 1990) (Wollman, J.), a senior judge who was retroactively denied Social Security credit for service during a brief window of Social Security coverage for senior judges challenged the denial as a Compensation Clause diminution. This argument was rejected on the grounds that his temporary coverage under Social Security was "not a direct *increase*" in compensation. 905 F.2d at 1202 (emphasis added).

. . . before the tax became law." Pl. Br. at 29. To some extent linked with this reading of *Evans* is plaintiffs' second contention that no taxation of judges is permissible if it makes judicial service relatively less attractive than it was when a judge took office. Pl. Br. at 20-21; Pl. Reply at 12-13. Plaintiffs' third argument is that the Social Security tax at issue here is not even an income tax of general applicability such as was permitted to be laid on judges by *O'Malley*. Pl. Br. at 25-26; Pl. Reply at 25-26; Tr. 15-16. Somewhat related to this argument is plaintiffs' last main point: that the scheme designed to bring federal employees under Social Security coverage discriminated against the plaintiff judges compared to other federal workers. Pl. Br. at 37-8, 40, 43; Tr. at 16-17, 19, 72-74. We discuss these four themes in turn.

A

Plaintiffs' first contention is that the factually similar *Evans* case (discussed above in part II-A) controls here, and thus that new taxes cannot be imposed on prior judges even if all other citizens are included in the new tax. Pl. Br. at 28-29. While it is true that the Supreme Court has never expressly overruled *Evans*, subsequent Court of Claims and Supreme Court cases convince us it would be irresponsible to dispose of this controversy on that ground. The Supreme Court itself long ago criticized the *Evans* case, *O'Malley*, 307 U.S. at 280-82, 59 S. Ct. at 839-40 (1939), and more recently confirmed that *Evans* has been "undermine[d]," *Will*, 449 U.S. at 227 n. 31, 101 S. Ct. at 486 n. 31. Additionally in *Will*, the Supreme Court reversed a trial judge who expressly relied on *Evans*, albeit in a factually

distinguishable case. *Will*, 449 U.S. at 227, 101 S. Ct. at 486-487.

Such negative Supreme Court guidance certainly discourages automatic reliance on *Evans*. But in addition, the *Will* and *O'Malley* decisions at the very least strongly suggest that a tax or other statute which indirectly reduces judicial pay is permissible absent evidence of a congressional intent to influence the judiciary. *Will*, 449 U.S. at 226-27 & nn.30-31, 101 S. Ct. at 486-87 & nn.30-31; *O'Malley*, 307 U.S. at 282, 59 S. Ct. at 840. Moreover, the Court of Claims stated that the Supreme Court has effectively overruled *Evans* "*at least* as regards [new] judges," *Atkins*, 214 Ct. Cl. at 215, 556 F.2d at 1044 (emphasis added).

Even in the face of this negative treatment, plaintiffs persist in their claim that though the broad rationale of *Evans* has certainly been narrowed by subsequent case law, the fact that *Evans* has never been expressly overruled means that some part of the holding survives. Pl. Br. at 28. According to plaintiffs, the surviving rule of *Evans* is that under the Compensation Clause, prior judges have more tax protection than new judges: you can't charge a prior judge new taxes. Pl. Br. at 28-29. Adopting this distinction between new and prior judges would require us to read much into *Evans*, because that case nowhere suggested such a difference. In fact the Court in *Evans* broadly defined the issue in that case as the taxability of the "compensation of federal judges *in general*," 253 U.S. at 247, 40 S. Ct. at 551 (emphasis added). We understand that the distinction between prior and new judges was arguably drawn by omission in *O'Malley* when the Court expressly limited its holding to new judges. 307 U.S. at 281-82, 59 S. Ct. at

839-40. But unlike the Court in *O'Malley*, here we are squarely addressed with the question of whether new judges have less tax protection than prior ones under the constitution. *O'Malley's* failure to expressly address the propriety of new taxes on prior judges is typical of the judicial restraint that Justice Frankfurter was known for, and is not a ruling against such taxation.[10]

Only the quite proper use of judicial restraint in *O'Malley* and later in *Will* prevented the Supreme Court from overruling *Evans*. Now that the question of whether prior judges should be afforded more Compensation Clause protection than new judges is at bar for the first time since the discredited *Miles* decision, reaching back to the 1920 *Evans* case to resolve the question in plaintiffs' favor would require us to willfully ignore the intervening, and uniformly critical, case history. This we decline to do, although because this history developed in factually distinguishable situations, the question in a narrow technical sense will arguably remain open until the Supreme Court addresses the point. As discussed above, the more recent Supreme Court and Court of Claims cases on the Compensation Clause counsel reliance on the dissenting view of Holmes in *Evans* rather than on the majority.[11] There-

[10] *See Jefferson County* v. *Acker*, 850 F. Supp. 1536, 1548 (N.D. Ala. 1994) (indicating in dicta that new judges would be entitled to the same Compensation Clause protection as the prior judges who were plaintiffs in the case).

[11] Plaintiffs agree that the Court of Claims in *Atkins* read the Supreme Court decision in *O'Malley* to adopt Holmes's dissent in *Evans*. Pl. Br. at 33. (A district judge evaluating *O'Malley* recently came to the same conclusion. *Acker*, 850 F. Supp. at 1546.) Though plaintiffs argue that the *Atkins* and Holmes rule allowing judicial salaries to be taxed is incompatible with the *Will* approach banning any diminution in gross judicial pay, Tr. at 70-71, we disagree. As we explained above in part II A, in actuality *Atkins* and *Will* are complementary because they deal with different facts. *Will* expressed the absolute Compensation Clause protection which exists when judicial pay is directly diminished, while the more flexible rule developed in *Atkins* indicates that in cases of indirect, take-home pay diminution like taxation, an inquiry into congressional intent is needed.

fore, we hold that judicial salary, like other components of a judge's income, is taxable. *Will*, 449 U.S. at 227 n.31, 101 S. Ct. at 486 n.31 (citing with approval *O'Malley*, 307 U.S. 277, 59 S. Ct. 838 (1939)); *Evans*, 253 U.S. at 265-266, 40 S. Ct. at 557 (Holmes, J., dissenting); *Atkins*, 214 Ct. Cl. at 216, 556 F.2d at 1044-45.

B

Given that we decline to rely on *Evans*, plaintiffs, in the alternative, claim that the statutes in question violate the Compensation Clause by wiping out a tax advantage prior judges enjoyed relative to other citizens, a situation plaintiffs contend to be different from that presented in *Evans*. Plaintiffs argue that in *Evans*, a new tax was imposed on both judges and other citizens "at the same time;"[12] in contrast, plaintiffs here were

[12] Pl. Reply at 16 n. 7. It is unclear what plaintiffs mean by "at the same time." While it certainly is true that the Revenue Act of 1918 (which was at issue in *Evans*) did for the first time tax the income of judges, § 213, 40 Stat. at 1065, it is also true that the Revenue Acts of 1916 and 1917 had already imposed broad-ranging income taxes, although exempting judges already in office, ch. 463, § 4, 39 Stat. 756, 759 (1916); ch. 63, § 1200, 40 Stat. 300, 329 (1917). Thus, the income tax was imposed on the public years before judges were included. Only by artificially viewing each successive year's income tax statute in isolation can it be said that the Revenue Act of 1918 imposed a tax on the public and on judges "at

subjected to the extension of an old tax they had escaped by becoming judges, thereby unconstitutionally costing sitting judges an advantage they held relative to non-judges. Pl. Reply 16 n.7. As we will show, plaintiffs' attempt to distinguish their case from *Evans* fails.

1

Plaintiffs argue that to be valid, any new tax on prior judges must be simultaneous with taxation of the public. Pl. Reply at 16 n.7; Tr. at 9-10. This is so because as long as an identical burden is simultaneously laid on the public and the judiciary, not even prior judges have suffered a diminution relative to other citizens[13] and so their judicial independence is not potentially threatened. Tr. at 9-10; *see* Pl. Br. at 16, 35-37; Pl. Reply at 19, 21. On the other hand, reason plaintiffs, the taking away of a tax exemption or other advantage held by prior judges relative to other citizens does potentially threaten judicial independence because it singles out judges.[14] *See* Pl.Br. at 20-21, 34; Pl. Reply at 16 n.7, 19.

Looking past the terms of plaintiffs' seemingly novel relativity argument to its substance, it appears plaintiffs' position at bottom is nothing more remarkable than that a new tax laid wholesale on prior judges and

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the same time." But for purposes of this discussion only, we accept plaintiffs' characterization.

[13] Hereafter, we may refer to this as the "simultaneity requirement."

[14] Hereafter, we may refer to this as plaintiffs' "relativity" argument or analysis.

the public is not discriminatory.[15] While this may be true, it provides no support for plaintiffs' further implication that a tax placed on the public and only later extended piecemeal to prior judges automatically violates the Compensation Clause as a potential threat to the independence of prior judges.

Plaintiffs have pointed to no good reason why Congress in taxing judges has the power to accomplish wholesale what it cannot do piecemeal. *See, e.g.*, Pl. Br. at 34; Pl. Reply at 2-3, 9-10, 12-13, 16 n.7. Plaintiffs equate comparative tax advantages enjoyed by judges with direct increases in judicial pay, arguing that both should at inception be permanent for judges then in office. Pl. Br. at 30-31, 34; Tr. at 8-9. But the purpose of the Compensation Clause is not to make irrevocable every momentary tax exemption enjoyed by sitting judges relative to the public; its purpose is rather to protect the independence of the judicial branch by insuring that judges are shielded from attempts by the political branches to impose economic duress. *O'Malley*, 307 U.S. at 282, 59 S. Ct. at 840; *Evans*, 253 U.S. at 265-67, 40 S. Ct. at 557-58 (Holmes, J., dissenting); *see Atkins*, 214 Ct. Cl. at 223, 556 F.2d at 1048-49. This underlying purpose leads to the simple rule of thumb which governs this case: in general, if judges are treated like other citizens by the tax laws, no threat to judicial independence arises, and so the Compensation Clause is not implicated. Congress always has the power to place judges in tax parity with other citizens.

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[15] Plaintiffs posit a scenario (first rhetorically raised in *Atkins*, 214 Ct. Cl. at 223, 556 F.2d at 1048) in which an enormous tax is laid across the land and then all other federal workers or citizens except judges get a raise or some other kind of relief. Pl. Br. at 36 n. 22. Suffice it to say that we do not here prejudge such a case.

2

Plaintiffs profess not to rely on *Evans* in deriving the simultaneity requirement for the taxation of prior judges. But plaintiffs' simultaneity requirement leads inescapably to the conclusion that the Compensation Clause provides the class of prior judges more tax protection than it does to new judges. This is the very conclusion that we rejected in refusing to rely on *Evans* above in part A. The new packaging does not yield a different result. Barring some sort of targeted discrimination, the finances of one individual judge or even a class of judges is not the concern of the Compensation Clause.[16] There is no requirement that prior judges be treated any differently from new judges for tax purposes: a judge escapes neither the present nor the future obligations of citizenship by taking the oath of office.

C

Plaintiffs go on to claim that even with the above arguments conceded Social Security is not a tax of general applicability like the one which was held proper as to judges in *O'Malley*. Pl. Reply at 24-25; Tr. at 15-16, 72-73. In this vein, plaintiffs first contend that

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[16] The proper constitutional focus is on the interaction between the branches of government, not on the appointment dates of individual judges. (It might be said that plaintiffs' analysis neglects the constitutional dimension of this case in favor of the astronomical.) The Compensation Clause is "not a private grant of privilege [to judges] but a limitation intended to benefit the public at large," *Atkins*, 214 Ct. Cl. at 223, 556 F.2d at 1049. The same idea is expressed in *Will*, 449 U.S. at 217, 101 S. Ct. at 481-82 and *O'Donoghue* v. *United States*, 289 U.S. 516, 533, 53 S. Ct. 740, 744, 77 L.Ed. 1356 (1933).

Social Security is not an income tax, but is rather a contributory public benefit plan. *E.g.* Pl. Br. at 26-27. In addition, plaintiffs maintain that Social Security taxes are not a truly general obligation of citizenship because the plan is not universal. *Id.*; Tr. at 72-73.

1

A close reading of plaintiffs' arguments shows that they do not seriously contend that Social Security is a contractual benefit plan rather than an income tax. In fact, plaintiffs themselves note that Social Security benefits are by no means guaranteed, and that the Congress could limit or cancel benefits under the program. Tr. at 10-11 (citing *Bowen* v. *Public Agencies Opposed to Soc. Secur. Entrapment*, 477 U.S. 41, 51-52, 106 S. Ct. 2390, 2396-97, 91 L.Ed.2d 35 (1986)). We agree. Of course, the taking of money by the federal government with no specific return obligation is typical of tax schemes, including income taxes. And, in fact, Social Security has long been treated as an income tax by courts. *Helvering* v. *Davis*, 301 U.S. 619, 634-35, 57 S. Ct. 904, 905-06, 81 L.Ed. 1307 (1937). It is plain that Social Security imposes an income tax.

2

At the heart of plaintiffs' argument that Social Security is not a tax of general applicability is the contention that the Social Security income tax is not sufficiently widespread. *See* Pl. Br. at 26, 36-37; Tr. at 72. We disagree. Social Security is a tax of general applicability, and so can be applied to federal judges. The parties have stipulated to the following facts: during 1984, the percentage of the paid civilian labor force covered by Social Security climbed from 91

percent to 93 percent, Jt. Stip. ¶ 18 (Appendix C to Pl. Br.), even while the paid civilian labor force increased from 102.2 million workers to 105.5 million, Jt. Stip. ¶ 27 (Table 4).

This amounts to effectively universal coverage of the nation's work force.[17] Given the web of exemptions and deductions allowed by Congress in virtually all areas of taxation, it is doubtful if any federal tax is of general applicability in the sense of applying to 100 percent of the possible taxpayers. We do not need to decide the boundaries of the term "a tax of general applicability" today. It is enough to say that the Social Security income tax, which at all times relevant to this litigation covered over 90 percent of paid civilian workers, is a tax of general applicability like that held valid as to judges by the Supreme Court in *O'Malley*.

D

Plaintiffs' last main Compensation Clause contention, somewhat linked to the idea that Social Security is not a tax of general applicability, is that the plaintiff judges were discriminated against as compared to the other federal employees affected by the same Social Security amendments. Pl. Br. at 37-38, 40, 43; Pl. Reply at 24; Tr. at 12, 15-17, 19, 22-23, 72-74. Plaintiffs contend that a Compensation Clause violation arises because judges, unlike all other federal employees, faced a mandatory reduction in take-home pay. Pl. Br. at 40, 43; Tr. at 74-75.

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[17] In September 1983, there were over 2.7 million federal employees. Jt. Stip. P 19.

1

However, using federal employees instead of the general public as the Compensation Clause benchmark to determine the validity of a tax does not help plaintiffs in this case, since for purposes of this discussion the two groups have historically been treated alike.

Most federal employees have long been required to contribute to retirement plans in order to obtain retirement benefits. *See* 5 U.S.C. §§ 8331-48 (1988). This does not apply to Article III judges, whose basic retirement plan is free, and provides for lifetime full pay when certain age and length of service requirements are met. 28 U.S.C. § 371 (1988). By the acts challenged here, Congress expanded Social Security to cover most federal positions, including Article III judgeships, for the first time. Jt. Stip. ¶ 20. Speaking generally, Congress reduced or offset the contribution federal employees were required to make to their retirement plan by the amount of any newly required Social Security tax. Pl. Proposed Findings of Uncontroverted Fact ¶ 11 ("PPUF"). The retirement plan benefits of federal employees were correspondingly reduced to account for any newly expected Social Security benefits. *E.g.*, Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub. L. 98-168, § 206(c)(2), 97 Stat. 1106, 1109-10 (1983) (codified as amended in a note after 5 U.S.C. § 8331 (1988)). The net result of inclusion in Social Security for most federal workers thus was no change in take-home pay or benefits. It is plainly the view of Congress that the Social Security tax is fungible with the other retirement payments required of federal employees. Thus, both before and after the acts in question, almost all

non-judicial federal employees, like over 90 percent of the nation's civilian workers, paid Social Security taxes or a mandatory equivalent.

Judges, with no retirement plan contributions to offset, were unique among federal employees in seeing their take-home pay necessarily decrease by the amount of the Social Security tax. PPUF ¶ 12. But this happened only because judges, unlike other federal employees and citizens, were never before required to pay into Social Security or a retirement plan equivalent to Social Security. There is no reason that tax burdens equivalent to those long required of other federal employees and working citizens cannot be extended to judges. *See supra*, part B(1). Here, the central Compensation Clause taxation rule has not been violated: judges are being treated no worse than other federal employees and citizens.

2

Even if we were to assume that the Social Security taxes at issue here did hurt judges compared to other federal workers, plaintiffs' Compensation Clause claim would not succeed. This is because in cases of indirect reduction in judicial compensation, it is an open question whether evidence of Congressional intent to pressure the judiciary would be enough to invalidate a statute. *Will*, 449 U.S. at 226 n. 30, 101 S. Ct. at 486 n.30. At any rate, without evidence of such an intent this legal question is moot. *Atkins*, 214 Ct. Cl. at 216, 228, 235, 556 F.2d at 1045, 1051, 1055.

In this case, there is absolutely no evidence of an intent to influence the judiciary. This conclusion is not disputed by plaintiffs, Pl. Br. at 21-22; *see* Pl. Reply at

2; rather, plaintiffs' by-now familiar argument is that any reduction in take-home pay should be handled like a direct reduction in salary, that is to say it is prohibited by the Compensation Clause regardless of congressional intent. Pl. Br. at 21-23; Pl. Reply at 2, 10, 12; Tr. at 69, 71-72.

As indicated above, plaintiffs' conclusion ignores two related rules of Compensation Clause jurisprudence. First, in case of an indirect diminution of judicial compensation, it is at least arguable that judges seeking relief under the Compensation Clause for an indirect reduction in pay must show not just a discriminatory effect but an intent to influence the judiciary. *See Will*, 449 U.S. at 226 n.30, 101 S. Ct. at 486 n.30; *Atkins*, 214 Ct. Cl. at 233, 556 F.2d at 1054. Second and more important to the instant case, it is clear that if the indirect diminution is due to a tax of general applicability and the possibility of discriminatory legislative intent has been ruled out, the tax is valid under the Compensation Clause. *O'Malley*, 307 U.S. at 282, 59 S. Ct. at 840; *Atkins*, 214 Ct. Cl. at 216, 556 F.2d at 1044-45. That is the case here.

IV

Plaintiffs claim that if their constitutional argument fails, they still may be able to prevail on a contract theory. Second Am. Cplt. Count III at 8-9. Defendant has moved for summary judgment on the contract claim, maintaining that judges serve pursuant to appointment, not contract. Def. Br. at 38-41.

Plaintiffs are unable to cite any convincing authority for the proposition that judges are contract employees. *See, e.g.*, Pl. Reply at 27-29; Tr. at 31-38. Plaintiffs point

chiefly to *Embry* v. *United States*, 100 U.S. 680, 25 L.Ed. 772 (1879), wherein the Supreme Court made the following statement: "No officer except the President or a judge of a court of the United States can claim a contract right to any particular amount of unearned compensation." 100 U.S. at 685. While this isolated sentence may be in plaintiffs' favor, the case it comes from is not. The holding of *Embry* is not that judges have a contract right to compensation while in office; in fact, the case is not about judges at all, nor even about incumbent officeholders. Instead, *Embry* holds that non- judicial federal officers such as postmasters do not have a contract right to compensation while suspended from office. 100 U.S. at 685. Since judges can only be impeached, not suspended, *Embry* has no relevance here. At any rate, the sentence relied on by plaintiffs, besides being taken out of context, is wholly unnecessary to the holding of the case and thus a textbook example of *dicta*.

Plaintiffs claim that even if *Embry* is distinguishable, this case falls squarely under the rule of *Johnson* v. *United States*, 111 Ct. Cl. 750, 79 F. Supp. 208 (1948). Tr. at 66. Again, we disagree. Johnson involved a judge who resigned from office. The Court of Claims found that such a judge has a contract or property right to his retirement pay. 111 Ct. Cl. at 756, 79 F. Supp. at 211. Without assessing the validity of this *Johnson* holding today, we note that a judge who resigns (as the plaintiff did in *Johnson*) is no longer a federal officeholder. *Booth* v. *United States*, 291 U.S. 339, 348-50, 54 S. Ct. 379, 380-81, 78 L.Ed. 836 (1934). At best for plaintiffs, *Johnson* holds that judges who resign from office in reliance on future retirement payments may have a contract remedy. The *Johnson* case has no

applicability to cases involving compensation for sitting Article III judges.[18]

Plaintiffs have cited no controlling authority indicating a possible contract claim. Pl. Reply at 27-29; Tr. at 31-37, 65-66. In our view, no such claim exists.

V

Plaintiffs' contention that the extension of Social Security taxes to sitting Article III judges violated the Compensation Clause is a pure question of constitutional law. There are no material facts in dispute. Therefore, defendant is entitled to judgment on Counts I and II, (Second Am. Cplt. at 7-8), as a matter of law. RCFC 56(c).

Plaintiffs' contention that they have a contract right to compensation is likewise a pure question of law involving no disputed material facts. Therefore, defendant is entitled to judgment on the contract claim, (Count III, Second Am. Cplt. at 8-9), as a matter of law. RCFC 56(c).

Based on the foregoing, plaintiffs' motion for summary judgment is DENIED, and defendant's cross-motion for summary judgment is GRANTED. Accordingly, judgment shall be entered in favor of defendant.

Each party shall bear its own costs.

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[18] This conclusion is strengthened by the fact that the Court of Claims in *Johnson* did not once cite the *dicta* from *Embry* which, if read in isolation, indicates that sitting judges have a contract right to compensation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 94-5139

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER, AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFFS-APPELLANTS

v.

THE UNITED STATES, DEFENDANT-APPELLEE

[Filed: Aug. 30, 1995]

Before: ARCHER, Chief Judges, PLAGER, and RADER, Circuit Judges.

RADER, Circuit Judge.

Sixteen federal judges challenged the withholding of Social Security taxes from their judicial salaries as a violation of the Compensation Clause of the United

States Constitution, Article III, section 1. Accordingly, they sought a tax refund or recovery of their diminished compensation. The United States Court of Federal Claims granted the Government summary judgment. *Hatter* v. *United States*, 31 Fed. Cl. 436 (1994). Because the Compensation Clause forbids diminishments in the compensation of Article III judges after they have taken office, and because the trial court did not determine whether a diminution in fact occurred, this court reverses and remands.

BACKGROUND

Until 1983, judges appointed under Article III of the Constitution, like most federal employees, did not participate in the Social Security program. Most legislative and executive federal employees acquired a retirement annuity by contributing to the Civil Service Retirement System. 5 U.S.C. §§ 8331-51 (1994). After meeting age and service requirements, however, Article III judges receive a retirement annuity equal to their judicial salaries without making additional payments. 28 U.S.C. § 371(a) (1988 & Supp. V 1993).

In the early 1980s, Congress ordered withholding of certain components of the Social Security tax from the salaries of most federal employees, including Article III judges. Withholding of the Hospital Insurance portion began on January 1, 1983. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 278(a), 96 Stat. 324, 559, 562 (codified as amended at 26 U.S.C. § 3121(u) (1988)). Withholding of the Old Age and Survivors Disability Insurance portion began on January 1, 1984. Social Security Amendments of 1983, Pub. L. No. 98-21, § 101(a)(1),(b)(1) & (d), 97 Stat. 65, 67-70 (codified as amended at 26 U.S.C. § 3121(b)(5)(E) (1988 & Supp.

V 1993) and 42 U.S.C. § 410(a)(5)(E) (1988 & Supp. V 1993)).

Sixteen Article III judges—all appointed before January 1, 1983—sued in the Court of Federal Claims for a refund of these Social Security taxes or recovery of their diminished compensation. The judges claimed that the taxation diminished their judicial compensation in violation of the Compensation Clause of the Constitution. The trial court granted the Government summary judgment that the Compensation Clause does not prohibit application of the tax to sitting Article III judges. *Hatter*, 31 Fed. Cl. at 445-47. The claimants appealed.

DISCUSSION

This court reviews a grant of summary judgment by the Court of Federal Claims *de novo*. *Cohen* v. *United States*, 995 F.2d 205, 207 (Fed. Cir. 1993).

I.

The Constitution's Compensation Clause states:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, *which shall not be diminished during their Continuance in Office.*

U.S. Const. art. III, § 1 (emphasis added). This constitutional language protects one of the most remarkable innovations of the 1787 document: a judicial branch sufficiently independent to enforce constitutional limitations on all branches of Government. The Supreme Court acknowledged:

> The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.

United States v. *Will*, 449 U.S. 200, 217-18, 101 S. Ct. 471, 482, 66 L.Ed.2d 392 (1980). Alexander Hamilton, writing in *The Federalist* No. 79, explained the Framers' reasoning for this means of protecting the separation of powers: "In the general course of human nature, a power over a man's subsistence amounts to a power over his will." *The Federalist* No. 79, at 472 (Clinton Rossiter ed., 1961) (emphasis omitted).

To provide a judiciary with sufficient independence to protect constitutional rights against any incursion, the Framers adopted an unrestricted protection for judicial compensation. Judicial independence, Alexander Hamilton prophetically noted, would prove "the citadel of the public justice and the public security." *The Federalist* No. 78, at 466 (Clinton Rossiter ed., 1961). Thus, as the Supreme Court concluded:

> [T]he prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

Evans v. *Gore*, 253 U.S. 245, 253, 40 S. Ct. 550, 553, 64 L.Ed. 887 (1920). For these reasons, the Constitution's language broadly prohibits any diminution in judicial compensation during a judge's continuance in office.

II.

This case raises the question whether imposition of new taxes on judges after they have taken office unconstitutionally diminishes their compensation. The Supreme Court addressed this very issue in *Evans*. In *Evans*, the Court held that the Compensation Clause prohibited imposition of the newly enacted income tax on sitting judges. Examining the broad constitutional protection for judicial independence, the Court wrote:

> The prohibition is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption . . . make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise,—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries.

Id. at 255, 40 S. Ct. at 553; *see also id.* at 249-52, 40 S. Ct. at 553.

When the judges in *Evans* first assumed office, Congress had not charged them with the duty of paying income taxes. Thus, the imposition of these taxes on their salaries acted as a reduction in their salary. As the Court observed:

> Here the Constitution expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation or otherwise . . . . [T]he compensation suffers a diminution to the extent that it is taxed.

Id. at 264. The Court therefore invalidated application of the income tax to judges who had taken office prior to the tax.

Evans controls this case. The claimants here are Article III judges who took office prior to imposition of the Social Security taxes in question. Federal law did not charge the claimants with the duty of paying Social Security taxes when they first assumed office. Subsequent imposition of the taxes reduced the claimants' salaries, as in *Evans*.

The subsequent Supreme Court case of *O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939), does not affect this analysis. In that case, the Court held that newly appointed Article III judges must continue to pay income taxes just as they had prior to appointment:

> To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

Id. at 282, 59 S. Ct. at 840.

Because the claimants in *O'Malley* took office after Congress had made income taxes applicable to judges' salaries, those judicial claimants suffered no diminishment in compensation after taking office. The tax was a pre-existing obligation factored into the new judges' compensation. On this basis *O'Malley* is distinguishable from *Evans* and the facts of this case. In *Evans* and this case, the claimants were already judges when the Social Security taxes took effect. The taxes therefore affected the claimants' established compensation. Thus, Congress's imposition of the Social Security tax on the claimants triggered scrutiny under the Compensation Clause.

The Supreme Court has stated that *O'Malley* "undermined the reasoning of *Evans*." *United States* v. *Will*, 449 U.S. 200, 227 n.31, 101 S. Ct. 471, 487 n.31, 66 L.Ed.2d 392 (1980). This court's predecessor has made the same point. *See Atkins* v. *United States*, 556 F.2d 1028, 1044, 214 Ct. Cl. 186 (1977) (en banc), *cert. denied*, 434 U.S. 1009, 98 S. Ct. 718, 54 L.Ed.2d 751 (1978). Neither of these pronouncements, however, are sufficient to overrule *Evans*. Had changes in judicial doctrine in fact "removed or weakened the conceptual underpinnings" of *Evans*, the Court itself would have overruled the case. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173, 109 S. Ct. 2363, 2370-71, 105 L.Ed.2d 132 (1989). It has not done so. Further, as the Supreme Court recently stated:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989). Again, the Supreme Court has never overruled *Evans*. *Evans* governs this case more directly than *O'Malley*.

The trial court erred by upholding the imposition of Social Security taxes on the claimants on the grounds that such taxation was both "generally applicable" and "non-discriminatory." *See O'Malley*, 307 U.S. at 282, 59 S. Ct. at 840; *see also Atkins*, 556 F.2d at 1045. The trial court holding thus interprets the Constitution's Compensation Clause to forbid only discriminatory taxes which single out the federal judiciary. In other words, the trial court in effect read the term "compensation" as synonymous with "salary," and "diminished" as synonymous with "intentionally reduced." This reading limited the protections for judicial independence to discriminatory attacks on the judiciary in the form of direct reductions in salary.

The words of the Constitution are not so limited, nor are its protections for judicial independence. "Compensation" embraces all forms of remuneration, not merely salary. "Diminished" embraces all means of decreasing, regardless of the intent or target of the reduction. Thus, the Constitution protects judicial compensation against all forms of diminishment.

The Constitution's enactment history supports this reading of the Compensation Clause. On June 13, 1787, the Constitutional Convention's Committee of the Whole drafted a resolution prohibiting Congress from

either increasing or decreasing the compensation of judges. Clinton Rossiter, *1787: The Grand Convention* 365 (1966). Gouveneur Morris opposed the prohibition on increases, as he believed that Congress should have the power to augment judicial compensation "as circumstances might require" to avoid "any improper dependence in the judges." 2 Max Farrand, *Records of the Federal Convention of 1787* at 44 (1911). Benjamin Franklin agreed and specified two circumstances—increases in workload and inflation of the currency—which would justify an increase. *Id.* at 44-45.

James Madison favored retaining the ban on increases in compensation. He feared that judges might unduly defer to Congress during legislative consideration of pay raises. *Id.* at 45. In other words, the Convention was unanimous on the overriding concern of protecting the judicial branch against meddling with its compensation. Further, the Convention voiced grave concerns about potential compromises in judicial independence if judges faced the prospect of seeking legislative redress of compensation concerns. In sum, the Convention perceived only mischief in the prospect of judges approaching the legislative branch to seek proper compensation. Ultimately, on a vote of 6-2, with one state absent, the Convention permitted increases and forbade all decreases in judicial compensation. *Id.* at 45.

Alexander Hamilton later explained this result:

> It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual [judge] for the worse.

The Federalist No. 79, at 473 (Alexander Hamilton) (Clinton Rossiter ed., 1961). According to Hamilton, the Compensation Clause's term "diminished" forbids any action which changes the "condition of the individual [judge] for the worse." *Id.*

James Madison concurred in Hamilton's analysis and extended the coverage of the term "compensation" to all "emoluments" of the judicial office:

> [M]embers of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be nominal.

The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961). In sum, the Convention considered judicial independence a core value of the Constitution and adopted a broad protection for it. *See Will*, 449 U.S. at 217-21, 101 S. Ct. at 481-84; *Evans*, 253 U.S. at 252-55, 40 S. Ct. at 552-54.

The text and history of the Compensation Clause do not support the test applied by the trial court. The Supreme Court itself suggested as much in *Will* where, in considering Congress's rescission of judicial pay raises, the Court stated: "the Constitution makes no

exceptions for 'nondiscriminatory' reductions." *Will*, 449 U.S. at 226, 101 S. Ct. at 486.

The Government's attempt to limit this statement in *Will* to 'direct diminutions' is unpersuasive. *O'Malley*, distinguished by the *Will* Court as applying a nondiscrimination test, held that nondiscriminatory taxation of a judge *who took office after the tax went into effect* does not violate the Compensation Clause. In such circumstances, the taxation formed part of that judge's compensation scheme from the outset of his tenure. *See O'Malley*, 307 U.S. at 282, 59 S. Ct. at 838.

Nor does *Atkins* provide support for application of a nondiscrimination test to the taxes imposed in this case. In *Atkins*, the United States Court of Claims found that Congress' failure to raise judicial salaries during a period of high inflation was not an actionable diminution under the Compensation Clause, because the plaintiff judges could not show that Congress intended an attack on the judiciary's independence.

However appropriate it may be to consider whether inflation diminishes judicial compensation in a discriminatory fashion, as in *Atkins*, or applies taxes of general applicability to judges taking office after such taxes are effective, as in *O'Malley*, neither the Compensation Clause nor Supreme Court precedent supports applying a non-discrimination test to the imposition of a new tax, even though generally applicable, on sitting judges. As indicated above, the controlling Supreme Court precedent, *Evans*, instructs otherwise. *Evans*, 253 U.S. at 254-55, 40 S. Ct. at 553-54. Under *Evans*, only judges who took office prior to the imposition of the new Social Security taxes suffered a diminution.

III.

The trial court did not determine whether the Social Security taxes in this case in fact diminished the claimants' compensation. Although noting that inclusion in Social Security might not result in an overall reduction of compensation, *Hatter*, 31 Fed. Cl. at 441 n.9, the trial court assumed a reduction, noting the decrease at least in take-home pay, for the purpose of resolving the summary judgment motions before it and proceeding to the constitutional issue.

As noted, the term "compensation" extends beyond mere salary, and includes all forms of remuneration attached to the judicial office. Therefore, the claimants' new Social Security retirement benefits, if any, are part of their compensation. These future benefits, however, are not vested in any manner. They thus do not give the claimants a certain entitlement to any offsetting sum. In addition, innumerable individual scenarios could eliminate a claimant's potential Social Security benefit, or greatly reduce the amount of the potential benefit. Because of all the variables that would have to be taken into account in arriving at even a rough estimate of a current discounted value for Social Security benefits that might be payable in the future, it is impossible accurately to weigh these benefits against the taxes withheld from the claimants.

It is certain, however, that the Social Security taxes diminished the claimants' salaries by specific amounts. The reduction was concrete, while the potential future benefit is entirely speculative. A speculative, incalculable future benefit cannot offset a concrete, present

reduction.* The Social Security taxes therefore diminished the claimants' compensation in violation of the Compensation Clause.

CONCLUSION

Social Security taxes diminish the compensation of Article III judges who took office prior to enactment of the taxes. This court therefore reverses and remands the case for tax refunds or recoveries for the sums improperly withheld from the claimants' salaries.

COSTS

Each party shall bear its own costs.

REVERSED and REMANDED.

* If the future benefits were calculable and marketable, however, an unconstitutional diminution in compensation would occur when a present reduction exceeded the present value of the future benefits minus reasonable transaction costs in marketing them.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 94-5139

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER, AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFFS-APPELLANTS

v.

THE UNITED STATES, DEFENDANT-APPELLEE

[Filed: Dec. 26, 1995]

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard

the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is DECLINED.

The mandate of the court will issue on January 2, 1996.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: December 26, 1995

/s/ By DIANE M. FRYE
DIANE M. FRYE
Chief Deputy Clerk

APPENDIX G

SUPREME COURT OF THE UNITED STATES

October 7, 1996

Affirmed for Absence of Quorum

No. 95-1733. *UNITED STATES* v. *HATTER, JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL.*, C.A. Fed. Cir. Because the Court lacks a quorum, 28 U.S.C. § 1, and since a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of the Court, the judgment is affirmed under 28 U.S.C. § 2109, which provides that under these circumstances the Court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided Court. JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE GINSBURG, and JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 64 F.3d 647.

APPENDIX H

UNITED STATES COURT OF FEDERAL CLAIMS

No. 705-89 C

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., DOLORES LEE BURCIAGA, EXECUTIX OF THE ESTATE OF CHIEF JUDGE JUAN G. BURCIAGA, DECEASED, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[June 6, 1997]

OPINION AND ORDER

TURNER, Judge.

This opinion addresses all damages issues related to claims by 16 federal judges that their compensation was

unlawfully diminished by imposition of Social Security taxes. There are no material facts in dispute.[1]

For reasons stated below, we conclude that eight of the plaintiffs are entitled to refunds of a portion of Social Security taxes withheld from salary in January 1984, together with compound interest. We further conclude, however, that any additional recovery is either barred by the applicable statute of limitations or offset by salary increases and that, consequently, the bulk of plaintiffs' claims for damages must be denied.

I

Plaintiffs are 16 federal district and circuit judges[2] who took office prior to January 1, 1983. On that date, all federal judges for the first time became subject to the Hospital Insurance (Medicare) (hereafter HI) portion of the Social Security tax.[3] Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, § 278(a), 96 Stat. 324, 559 (1982) (codified as amended at 26 U.S.C. (I.R.C.) § 3121(u) (1988)). One year later, judges

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[1] Procedurally, the case stands on three dispositive motions: plaintiffs' motion filed November 12, 1996 for summary judgment and defendant's pair of motions filed December 18, 1996, one a cross-motion for summary judgment and the other a motion to dismiss-in-part on limitations grounds. Oral argument was conducted on March 7, 1997. The order in Part IX of this opinion resolves all three dispositive motions.

[2] In two instances, a current plaintiff is the legal successor in interest to an original plaintiff. Further, Judge Raul A. Ramirez resigned effective as of January 1, 1990.

[3] The Hospital Insurance tax (HI) funds Medicare Part A and is imposed upon employees by 26 U.S.C. § 3101(b). During 1983 the HI tax was 1.3 percent of the first $35,700 of compensation. Def. Br. (12/18/96), p. 7.

became subject to the Old Age Survivors and Disability Insurance (hereafter OASDI) portion of the Social Security tax, and since January 1, 1984, all federal judges have been fully subject to Social Security taxes.[4] Social Security Amendments of 1983, Pub. L. No. 98-21, § 101(a)(1), (b)(1) and (d), 97 Stat. 65, 68, 69 (codified as amended at 26 U.S.C. (I.R.C.) § 3121(b)(5)(E) (1988) and 42 U.S.C. § 410(a)(5)(E) (1988)). Social Security taxes have been duly withheld from plaintiffs' monthly compensation since the effective dates of these acts.

Since the original plaintiffs filed their complaint on December 29, 1989, there have been four prior published opinions regarding this case. Chronologically, they are *Hatter* v. *United States*, 21 Cl. Ct. 786 (1990) (*Hatter I*), *Hatter* v. *United States*, 953 F.2d 626 (Fed. Cir.1992) (*Hatter II*), *Hatter* v. *United States*, 31 Fed. Cl. 436 (1994) (*Hatter III*), and *Hatter* v. *United States*, 64 F.3d 647 (Fed. Cir.1995) (*Hatter IV*), *aff'd by a divided court*, —— U.S. ——, 117 S. Ct. 39, 136 L.Ed.2d 3 (1996).

In *Hatter I*, this court dismissed plaintiffs' claim for lack of jurisdiction, concluding that the plaintiffs were seeking a tax refund and had failed to observe statutory prerequisites to suit. *Hatter I*, 21 Cl. Ct. at 789. The Federal Circuit reversed, holding that plaintiffs were not seeking tax refunds, but rather were asserting damage claims arising directly under the Constitution which mandates the payment of money. *Hatter II*, 953 F.2d at 630. The case was remanded to this court for a determination on the merits.

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[4] Pursuant to 26 U.S.C. §§ 3101 and 3121(a) and section 230 of the Social Security Act (42 U.S.C. § 430), the 1984 OASDI tax was 5.4 percent of the first $37,800 of compensation.

In *Hatter III*, 31 Fed. Cl. at 447, this court dismissed plaintiffs' claims on the merits. We held that although Social Security taxes caused a reduction in the judges' take-home pay, imposition of the taxes did not violate the Compensation Clause of the Constitution, since the Social Security taxes imposed were nondiscriminatory and generally applicable to the public.

The Federal Circuit reversed, holding that the imposition of Social Security taxes on sitting judges diminished their compensation. *Hatter IV*, 64 F.3d at 652-53. The Federal Circuit remanded the case for award of "tax refunds or recoveries for the sums improperly withheld from the claimants' salaries." *Id.* at 653.

II

In this damages proceeding, plaintiffs seek recovery of the total amount of HI and OASDI taxes withheld from their salaries from 1983 to the present, plus interest compounded annually. In total, plaintiffs request an award in the amount of $1,059,675.59 (as of January 15, 1997).

Plaintiffs take the position that the court's task is limited to calculating the precise amounts of HI and OASDI taxes withheld from their salaries and making an award of those amounts with compound interest. Plaintiffs say with respect to principal that the remand directions of the Federal Circuit in *Hatter IV* are not subject to any other reasonable interpretation.

Defendant argues that all plaintiffs' claims are time-barred to the extent they seek to recover for any amounts withheld prior to January 1, 1984. Similarly,

defendant argues that claims by those judges added to the case in 1992 are time-barred at least for years 1984, 1985, and part of 1986 because those claims had accrued more than six years before these judges or new claims were added to the current action.

Defendant further argues that salary increases beginning as of January 1, 1984 more than offset the amount of any Social Security tax deductions from the plaintiffs' salaries for services during and after 1984. Finally, defendant asserts that the plaintiffs are not entitled to an award of interest on any recovery of principal.

III

The history of claim presentation and appearance of plaintiffs in this litigation provides a useful beginning for resolution of damages issues.

A

The original complaint was filed on December 29, 1989 by ten judges. The complaint was specifically limited to OASDI taxes withheld on and after January 1, 1984. The complaint did not object to or otherwise address imposition of HI taxes which had become effective on January 1, 1983 and did not request any damages for taxes withheld during 1983.

After the remand instructing this court to resolve the merits of the case, *Hatter II*, 953 F.2d at 630, a First Amended Complaint was filed on June 25, 1992. This pleading, submitted more than nine years after imposi-

tion of HI taxes, added four new plaintiffs[5] and set forth an alternative claim for tax refunds but, like the original complaint, expressed no objection to imposition of HI taxes and made no request for damages suffered in 1983.

A Second Amended Complaint was presented on December 11, 1992 (filed on January 11, 1993). This pleading added two new plaintiffs (bringing the total to the current 16) and, for the first time, asserted a right to damages resulting from imposition of HI taxes on January 1, 1983.[6]

As is clear from the foregoing, all 16 plaintiffs first presented a claim for recovery of HI taxes more than nine (almost ten) years after the tax was imposed. Although the original complaint presented OASDI claims, only eight of the current plaintiffs were in the case on the first remand in 1992. In June 1992, two original plaintiffs reasserted and four new plaintiffs asserted for the first time claims related to OASDI taxes; in December 1992, two additional new plaintiffs

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[5] After the first judgment by this court dismissing the claims for failure of jurisdictional prerequisites, see *Hatter I*, 21 Cl. Ct. at 789, only eight of the original ten plaintiffs appealed from the judgment, and consequently only eight plaintiffs were in the case upon the first remand. The First Amended Complaint filed on June 25, 1992 actually added six plaintiffs, but two of them (Judges Bowen and Roettger) were original plaintiffs who had not appealed from the first judgment.

[6] In the original complaint, ¶ 16 at p. 5, and in the First Amended Complaint, ¶ 21 at pp. 5-6, plaintiffs in those pleadings asserted that the imposition of OASDI taxes on January 1, 1984 represented the first time that Social Security deductions were withheld from judges' compensation.

asserted for the first time claims related to OASDI taxes.

(For ease of reference, we hereafter designate the eight original plaintiffs who prosecuted the first appeal and were part of the case upon the first remand as the "original" plaintiffs and the remaining eight plaintiffs who first joined or rejoined the suit after the first remand as the "later-filing" plaintiffs.)

B

In the remainder of this opinion, we first address the OASDI claims of the "original" plaintiffs.

Thereafter, we address (1) the OASDI claims of the eight "later-filing" plaintiffs and (2) the claims of all plaintiffs based on imposition of HI taxes. Resolution of these claims involves application of statutes of limitations together with related issues including the "relation-back" doctrine and the "continuing claim" doctrine.

Finally, we address the issue of interest on damages awards for Compensation Clause violations.

IV

In *Hatter IV*, 64 F.3d at 653, the Federal Circuit remanded "for tax refunds or recoveries for the sums improperly withheld from the claimants' salaries." Remand was necessary because "the trial court did not determine whether the Social Security taxes in this case *in fact* diminished the claimants' compensation." *Id.* at 652 (emphasis added).

A

At all material times, the salaries of federal judges have been paid in monthly installments as of the first day of each calendar month for services during the preceding calendar month. Hence, the salary payments to plaintiffs on or about January 1, 1984 were for services during December 1983, and OASDI taxes withheld from such salary installment, although assessed with respect to and extracted from salary paid in 1984, had the effect of reducing compensation earned in December 1983.

Defendant concedes, in light of *Hatter IV*, that eight of the plaintiffs[7] are entitled to damages for the amount of OASDI taxes withheld from salary payments made in January 1984 for services in December 1983. That amount is $328.95 for seven of the original plaintiffs who were district judges on January 1, 1984, and $347.85 for the original plaintiff who was a circuit judge on January 1, 1984. Def. Br. (2/25/97), p. 4.

Because no salary increase which first became effective on or after January 1, 1984 was retroactive to December 1983, there has been no possible cure of diminution which occurred with respect to income accrued for December 1983. Therefore, we agree with defendant that the eight plaintiffs indicated are entitled to recover the amount equal to OASDI taxes withheld from salary payments in January 1984.

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[7] District Judges Hatter, Arceneaux, Beer, Burciaga, McNamara, Ramirez, and Wiseman (or their successors in interest) and Circuit Judge Pregerson.

We address in Part VIII below plaintiffs' claims of entitlement to interest on damages.

B

Defendant contends that pay increases in 1984 and subsequent years have offset the diminution of plaintiffs' salaries caused by all OASDI taxes (in fact, all Social Security taxes) withheld from salary payments after January 1, 1984. Even though the Federal Circuit held in *Hatter IV*, 64 F.3d at 652, that "the Social Security taxes diminished the claimants' salaries by specific amounts," it did not have occasion to consider whether a simultaneous or subsequent retroactive increase could offset or cure the diminution in Article III compensation[8] resulting from the Social Security tax deductions. The issue is one of first impression.

In resolving the issue, we start with a straightforward application of arithmetic and logic to the question whether a simultaneous or subsequent pay raise can cure prospectively any diminution resulting from the imposition of a new tax. We then apply two concepts gleaned from legislation and case law, to wit, (1) that taxation of judges' compensation does not, per se, constitute an unlawful diminution, rather it is imposition of a new tax on sitting judges which results in a prohibited diminution, and (2) that Congress has no

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[8] The Compensation Clause in the United States Constitution provides: "The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.

enforceable duty to raise the salaries of judges, rather any increase is a matter of legislative discretion.

1

At the outset, one would suppose that there could be no dispute that if, simultaneously with the imposition of a new tax, Congress granted an increase in salary which equaled or exceeded the tax, no diminution in the level of compensation just prior to imposition of the tax would have occurred. The mathematical result is the same as if the judge received either no salary increase or an increase in the amount of any excess of the raise over the tax. An increase subsequent to imposition of a new tax would have a similar effect prospectively.

2

Case law applying the Compensation Clause, U.S. Const. art. III, § 1, makes plain that Article III does not prohibit taxation of judges per se but only imposition of new taxes on sitting judges, *Hatter IV*, 64 F.3d at 650.

In *O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939), the Supreme Court held that a federal circuit judge who was appointed after federal income taxes had become effective may be taxed by Congress, and that such taxation did not violate the Compensation Clause. *O'Malley*, 307 U.S. at 282, 59 S. Ct. at 840.

The Federal Circuit recognized, *Hatter IV*, 64 F.3d at 650, that all taxes on federal judges are not unconstitutional:

> Because the claimants in *O'Malley* took office after Congress had made income taxes applicable to

judges' salaries, those judicial claimants suffered no diminishment in compensation after taking office. The tax was a pre-existing obligation factored into the new judges' compensation.

Plaintiffs concede that a general increase in federal income tax rates would not constitute a diminution for any judges currently in office.

3

We next explore the concept that Congress has no enforceable obligation to raise the salaries of judges and, consequently, whether judges receive any increase in compensation is a matter within the discretion of Congress.

In the Constitutional Convention of 1787 which drafted Article III, proposals were made and serious consideration given to prohibiting Congress from making any increase to the compensation of a judge once appointed. For discussions of various positions considered at the convention, *see United States* v. *Will*, 449 U.S. 200, 219-20, 101 S. Ct. 471, 482-83, 66 L.Ed.2d 392 (1980); *Atkins* v. *United States*, 214 Ct. Cl. 186, 217-221, 556 F.2d 1028 (1977), and *Hatter IV*, 64 F.3d at 651. Indeed, such a prohibition on increases as well as decreases in compensation was adopted with respect to the President. U.S. Const. art. II, § 1, cl. 6 ("The President shall . . . receive . . . a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected. . . .").

It is reasonable to suppose that the Founders—who seriously debated whether *any* increase in the salaries of sitting judges should be permitted and agreed that

there should be none for a President between elections—assumed that Congress would be under no enforceable duty or obligation to raise judicial salaries. Rather, Congress was left with discretion to increase salaries when, in its wisdom, it chose to do so. The same Convention drafted and proposed simultaneously the Appropriations Clause, U.S. Const. art. I, § 9, cl.7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . .").

The Supreme Court held in *Will*, 449 U.S. at 226-29, 101 S. Ct. at 486-88, that Congress may rescind a judicial salary increase provided in a statute so long as it does so before the increase becomes effective. "The Constitution delegated to Congress the discretion to fix salaries and of necessity placed faith in the integrity and sound judgment of the elected representatives to enact increases when changing conditions demand." *Id.* at 227, 101 S. Ct. at 487.

Earlier, the Court of Claims in *Atkins* v. *United States*, 214 Ct. Cl. 186, 221-28, 556 F.2d 1028 (1977), *cert. denied.*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978), rejecting assertions by judges that their compensation had been unconstitutionally diminished by economic inflation, recognized that Congress has discretion to increase judicial salaries or to refrain from doing so if the absence of increases is not the result of an intent to discriminate against the judiciary. No such discriminatory intent is alleged in the instant case.

Congress has provided concerning judicial compensation, § 140 of Public Law No. 97-92, 95 Stat. 1183, 1200, December 15, 1981, that federal judges are not entitled to any salary increases "except as may be specifically authorized by Act of Congress."

4

In sum, applying the concepts under discussion, we conclude that when unlawful diminution of judicial compensation results from imposition of a new tax, as found by the Federal Circuit in *Hatter IV*, 64 F.3d at 653, that diminution is subject to setoff or cure by simultaneous or subsequent salary increases which Congress may, in its discretion, enact, it being under no enforceable obligation to grant any increase. Thus, if Congress mandates that federal judges pay a certain amount in a new tax but, at the same time, gives those judges a salary increase in an amount equal to or greater than the amount of the tax, then any diminution within the meaning of the Compensation Clause is immediately cured. This is what occurred with respect to plaintiffs.

The order of compensation events is obviously quite important. If Congress increased judicial salaries and thereafter took action (either a direct reduction in nominal salary or imposition of a new tax) resulting in a diminution of compensation, the earlier increase would have become part of constitutionally protected compensation adversely affected by the diminution. This is the essence of *Will*, 449 U.S. at 200, 101 S. Ct. at 473-74. On the other hand, if an increase in nominal salary occurred simultaneously with or subsequent to such a diminution, the simultaneous or subsequent increase accomplishes a cure to the extent of such increase. As illustrated below, this is the situation in this case with respect to OASDI taxes withheld for 1984 and subsequent years.

C

The first *Hatter* panel in the Federal Circuit implicitly recognized that Congress may restore any diminution that may have occurred. The court reasoned that "only a timely restoration of lost compensation would prevent violation of the Constitution's prohibition against diminution of judicial salaries." *Hatter II*, 953 F.2d at 628.

Similarly, in *Will*, the judge claimants apparently recognized a prospective cure after an unlawful salary reduction was restored. *Will*, 449 U.S. at 206, n.3, 101 S. Ct. at 476, n.3. There, in the first of four years at issue, Congress had made a retroactive direct reduction to nominal annual judicial salaries already in effect as of October 1, 1976, but then, effective on March 1, 1977, increased the salaries to a level which exceeded the October 1, 1976 level. *Id.* at 206, 101 S. Ct. at 476. The parties and the Court apparently assumed that the earlier unlawful reduction was cured prospectively as of the March 1, 1977 restoration.

D

Plaintiffs' position on damages is exactly the same as it would be if there had been no increase in nominal salary since December 31, 1983. In plaintiffs' analysis, the government gets no credit for any part of the increase in salary over the years. Neither does it get any credit for the Social Security benefit.

It is consistent with plaintiffs' position that if Congress awarded all judges a pay raise of $1,000,000 per year retroactive to January 1, 1983 but not specifically or expressly related to the Social Security taxes

imposed in 1983 and 1984, it would not cure the diminution resulting from imposition of the taxes. Under plaintiffs' theory, all Social Security taxes withheld must be refunded to plaintiffs and there can absolutely be no cure by subsequent increases in salary. Plaintiffs insist that only a payment specifically designated as a refund of or damages for the Social Security taxes withheld can satisfy the unconstitutional diminution found by the Federal Circuit.[9]

Plaintiffs' current position on cure represents a change of position for them. In both the original complaint, ¶ 18 at 5, and in the First Amended Complaint, ¶ 21 at 6, plaintiffs, after reciting imposition of OASDI taxes beginning on January 1, 1984, stated: "Either as a result of these deductions, *or as a result of defendant's failure to increase plaintiffs' salaries by the amount of these deductions*, defendant has diminished plaintiffs' compensation." (Emphasis added.) In the Second Amended Complaint, ¶ 23 at 6, plaintiffs made the identical statement concerning cure with respect to both OASDI taxes and HI taxes.

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[9] At oral argument on damages issues conducted on March 7, 1997, the following colloquy occurred:

> THE COURT [to plaintiffs' counsel]: You do take the position that if the judges this year got a staggering raise, but no reasons [were] assigned for it, it would not stop the running of this diminution?
>
> [PLAINTIFFS' COUNSEL]: Absolutely. That is our position.

Transcript (3/7/97) at 10.

E

Plaintiffs argue that *Evans* v. *Gore*, 253 U.S. 245, 264, 40 S. Ct. 550, 556-57, 64 L.Ed. 887 (1920), which the Federal Circuit has held controlling in *Hatter IV*, 64 F.3d at 650, effectively precludes application of a cure concept as just discussed. *Evans* held that imposition of federal income taxes on federal judges constituted a diminution in violation of the Compensation Clause. Plaintiffs point out that the day after the income tax was enacted, Congress increased the compensation of federal judges by $1500, an amount significantly higher than the income tax withheld from the judges' salary. Plaintiffs thus assert that "there was no argument that the subsequent pay increase 'cured' this diminution." Pl. Reply Br. (1/16/97) at 8-9.

There are two defects in plaintiffs' assertion that the facts of *Evans* preclude cure as a matter of law. First, there was no discussion whatever of this issue in the *Evans* opinion. The Court made no mention of any salary increase subsequent to imposition of the tax on 1918 income by an Act of Congress adopted in 1919. Second, and more importantly, the facts of *Evans* involved income tax for the single year 1918, while the 1919 salary increase referred to by plaintiffs was not effective until March 1, 1919 and was prospective only. Pl. Reply Br. (1/16/97) at A19-A21. We would agree, on the *Evans* facts, that an unlawful reduction of income with respect to one calendar year is not cured by a non-retroactive salary increase, however large, in the next calendar year.

V

In calculating the diminution which resulted from the imposition of Social Security taxes, the fundamental first step is establishment of the compensation level entitled to protection from diminution. (Because, as explained below, all plaintiffs are time-barred from contesting the withholding of HI taxes in 1983, we address only the compensation level entitled to protection immediately prior to January 1, 1984, the effective date of the imposition of OASDI taxes.)

As of December 31, 1983, the nominal annual salary[10] of district judges was $73,100, and the nominal annual salary of circuit judges was $77,300. Consequently, pursuant to the Federal Circuit's holding in *Hatter IV*, those were the compensation levels entitled to protection from diminution by imposition of the OASDI tax on January 1, 1984.

Having determined that subsequent pay raises may cure prospectively a Social Security tax withholding for the same year to the extent the salary increase is equal to or larger than the Social Security tax withholding, we turn to the calculation of any actual diminution in plaintiffs' compensation.

A

For calendar year 1984, effective as of (retroactive to) January 1, district judges received an increase in

[10] In this context, "nominal annual salary" designates the stated lawful salary before deduction of federal and state income taxes, Social Security taxes and voluntary items such as life and health insurance premiums and survivor annuity premiums.

nominal annual salary of $2,900; circuit judges received a corresponding increase of $3,100.

The OASDI tax imposed on each plaintiff for calendar year 1984 was $2,041.20. Thus, the salary increase for each plaintiff over the 1983 compensation base more than offset the OASDI tax for 1984. (Although not relevant for present purposes, the 1984 salary increase more than offset the total of both OASDI and HI taxes for 1984.)

B

For calendar year 1985, effective as of January 1, district judges received an additional increase in nominal annual salary of $2,700 resulting in a cumulative adjustment of $5,600 over the base protected from diminution by OASDI taxes; circuit judges received a corresponding increase of $2,800 resulting in a cumulative adjustment of $5,900.

The OASDI tax imposed on each plaintiff for calendar year 1985 was $2,257.20. Thus, the cumulative salary increase over the 1983 base more than offset the OASDI tax for 1985. (Although not relevant for present purposes, the cumulative salary increase more than offset the total of both OASDI and HI taxes for 1985.)

C

As illustrated in the immediately preceding subpart, by calendar year 1985, the cumulative increase in nominal annual salary for both district and circuit judges exceeded the base protected from diminution by OASDI taxes by more than $4,000; these increases have

remained in effect. In contrast, the total of OASDI tax imposed on each plaintiff has never exceeded $4,000 in any calendar year. Thus, the cumulative salary increase over the 1983 base has more than offset the OASDI tax for each year from 1984 through 1996.

D

For 1986, although no increase to the nominal annual salary of any of the plaintiffs became effective, the cumulative increase over the protected base remained in effect, *i.e.*, $5,600 for district judges and $5,900 for circuit judges. The OASDI tax imposed on each plaintiff for calendar year 1986 was $2,394. Thus, the cumulative salary increase over the 1983 base more than offset the OASDI tax for 1986. (Although not relevant for present purposes, the cumulative increase more than offset the total of both OASDI and HI taxes for 1986.)

E

For calendar year 1987, district judges received an increase in nominal annual salary of $2,400 effective on January 1 and an additional increase of $8,400 effective on March 1, resulting in a cumulative adjustment of $16,400 over the base protected from diminution by OASDI taxes; circuit judges received corresponding increases of $2,500 and $9,300, resulting in a cumulative adjustment of $17,700.

The OASDI tax imposed on each plaintiff for calendar year 1987 was $2,496.60. Thus, the cumulative salary increase over the 1983 base more than offset the OASDI tax for 1987. (Although not relevant for pre-

sent purposes, the cumulative increase more than offset the total of both OASDI and HI taxes for 1987.)

F

As illustrated in the immediately preceding subpart, by calendar year 1987, the cumulative increase in nominal annual salary for both district and circuit judges far exceeded $6,000; these increases have remained in effect. In contrast, the total of Social Security taxes (OASDI and HI taxes) imposed on each plaintiff has never exceeded $6,000 in any calendar year. See Schedules A through D, Def.Br. (2/25/97) and Appendices B & C, Pl. Br. (11/12/96). Thus, the cumulative salary increase over the 1983 base has more than offset the total of both OASDI and HI taxes for each year from 1984 through 1996, and, consequently, no unlawful diminution in judicial compensation occurred during those years.

G

There were additional salary increases for both district and circuit judges effective on February 1, 1990 and on January 1 of 1991, 1992 and 1993.[11] As of January 1, 1993, the total nominal annual salary of district judges was (and remains) $133,600, and the corresponding salary of circuit judges was (and remains) $141,700. These most recent salary levels reflect a cumulative increase in nominal annual salary over the 1983 base protected from diminution by OASDI taxes ($73,100 for

[11] The increases in nominal annual salary for district judges were in the amount of $7,500 in 1990, $28,500 in 1991, $4,400 in 1992 and $4,100 in 1993. For circuit judges the increases were $7,100 in 1990, $30,200 in 1991, $4,600 in 1992 and $4,400 in 1993.

district judges and $77,300 for circuit judges) in the amount of $60,500 for district judges and $64,400 for circuit judges. These annual sums are more than ten times higher than the total of Social Security taxes withheld during any calendar year.

VI

We next address (1) the OASDI claims of the eight later-filing plaintiffs and (2) the claims of all plaintiffs based on imposition of HI taxes.

Resolution of these claims involves application of statutes of limitations together with two related issues: (1) whether the "relation-back" doctrine applies to claims of the later-filing judges and to new claims by the "original plaintiffs" first asserted in 1992, and (2) whether the "continuing claim" doctrine is applicable to the claims asserted in this case. Alternatively, application of the concept of cure discussed in Parts IV and V above has potential application to a complete resolution of these remaining claims.

A

Reference is made to Part I of this opinion for designation of the two statutes which resulted in imposition of Social Security taxes on federal judges and the effective date of each. Suffice it to say at this juncture that HI taxes became effective and were first withheld from judicial compensation on January 1, 1983, and that OASDI taxes became effective and were first withheld from judicial compensation on January 1, 1984.

Reference is further made to Subpart III A above for a statement of the timing of claim presentation and

appearance of plaintiffs in this litigation. Suffice it to say for limitations purposes that the eight later-filing judges first presented (or reasserted) their claims based on OASDI taxes in June and December 1992 (more than eight years after imposition of OASDI taxes on judges) and that all plaintiffs first presented claims based on imposition of HI taxes in December 1992 (more than nine years after imposition of HI taxes on judges).

B

A claim against the United States for damages is barred unless the complaint is filed within six years after the claim first accrued. 28 U.S.C. §§ 2401(a) & 2501.[12] A cause of action accrues "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action," *Oceanic S.S. Co.* v. *United States*, 165 Ct. Cl. 217, 225 (1964), and "the plaintiff was or should have been aware of their existence," *Hopland Band of Pomo Indians* v. *United States*, 855 F.2d 1573, 1577 (Fed. Cir.1988). "A constitutional claim can become time-barred just as any other claim can. . . . Nothing in the Constitution requires otherwise." *Block* v. *North Dakota ex rel. Board of University & School Lands*, 461 U.S. 273, 292, 103 S. Ct. 1811, 1822, 75 L.Ed.2d 840 (1983). *See Lunaas* v.

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[12] Title 28 U.S.C. § 2401(a) provides in pertinent part: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

Title 28 U.S.C. § 2501 provides in pertinent part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

United States, 936 F.2d 1277, 1279-80 (Fed. Cir.1991), *cert. denied*, 502 U.S. 1072, 112 S. Ct. 967, 117 L.Ed.2d 132 (1992) (applying *Block* to bar suit based on Article VI of Constitution brought more than six years after accrual of claim).

The Supreme Court has stated that the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276, 77 S. Ct. 269, 273, 1 L.Ed.2d 306 (1957).

C

Based on this law, the critical initial matters for determination are the dates on which plaintiffs' claims for the two new taxes first accrued. Plainly, those dates are January 1, 1983 for HI taxes and January 1, 1984 for OASDI taxes, the effective dates of imposition of the taxes and the respective dates on which each tax was first withheld from plaintiffs' salaries.

A comparison of these claim accrual dates with the initial claim-presentation dates significantly exceeding six years from claim accrual leads inescapably to the conclusion that unless the claims can be deemed to relate back to a date within six years of initial accrual,[13] the claims are barred under the two controlling statutes of limitations.

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[13] Unless the claims are deemed to relate back to a time within six years of first accrual or unless they are deemed to be "continuing claims," the six-year statutes of limitations would have run on HI claims on January 1, 1989 and on OASDI claims on January 1, 1990.

D

Plaintiffs argue that the claims of the later-filing judges asserted in the first and second amended complaints (June and December 1992) relate back to the claims in the original complaint (December 29, 1989) pursuant RCFC 15(c) and thus are timely. RCFC 15(c) provides: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

The relation-back issue concerning OASDI taxation is different from the issue concerning HI taxation:

(a) To the extent of their OASDI claims, the later-filing plaintiffs were asserting the same cause of action as that set forth in the original complaint. Therefore, while there can be no question that the OASDI "claim . . . asserted in the amended pleading arose out of the . . . occurrence set forth . . . in the original" complaint, the relation-back problem of the later-filing judges is that they were not the same as the original plaintiffs. Though similarly situated, their position in the case is no different than it would be if each later-filing plaintiff had filed his own separate suit.

(b) To the extent of the HI claims first presented in the Second Amended Complaint, all plaintiffs are asserting a claim which did not arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

"The general rule . . . is that the rule of relation-back does not extend to amendments that add new parties or causes of action." *Snoqualmie Tribe of Indians* v. *United States*, 178 Ct. Cl. 570, 588, 372 F.2d 951, 961 (1967). We address these two relation-back issues separately.

E

The matter of potential relation back of HI claims may be dealt with succinctly. When these claims were broached by all plaintiffs in the Second Amended Complaint submitted almost ten years after first accrual, they were totally new diminution claims.

The diminution claims set forth in the original and the first amended complaints were emphatically and specifically based on imposition of OASDI taxes pursuant to legislation adopted in 1983. Although at the time of filing of the original complaint the HI tax (imposed pursuant to legislation adopted in 1982) had been in effect for almost one year, it was not mentioned. Consequently, the HI claims of all plaintiffs did not arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading," RCFC 15(c), and do not relate back to any date prior to December 11, 1992.

Interestingly, even if the HI tax claims of all plaintiffs were deemed to relate back to the original case filing date, those claims would still be time barred since the original filing date (December 29, 1989) was more than six years after the claims for HI taxes first accrued (January 1, 1983). Further, even if all HI taxes withheld from the salary of each judge during 1983 are viewed as having been withheld on the last salary

payment date for judges during calendar year 1983, that day would be December 1, 1983. Thus, in any event, the HI claims would still have been presented more than six years after they first accrued.[14]

We address in Part VII below whether plaintiffs' HI claims are continuing claims not time barred to the extent of taxes withheld after December 11, 1986, the commencement of the six-year period preceding presentation of the Second Amended Complaint. (However, alternatively, even if the claims are deemed continuing claims, any portion of such claim accruing after December 11, 1986 has been offset by salary increases, as explained in Parts IV and V above.)

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[14] Plaintiffs suggest that the cause of action for diminution resulting from HI taxes did not first accrue until April 15, 1984. Pl.Br. (1/16/97) at 21-23; Transcript (3/7/97) at 16-21. Their position is grounded on 26 U.S.C. (I.R.C.) § 6513(c) which provides that *for purposes of 26 U.S.C. § 6511*, Social Security taxes with respect to one calendar year, if paid before April 15 of the following calendar year, are deemed paid and the corresponding returns are deemed filed on April 15 of such succeeding year. But 26 U.S.C. (I.R.C.) § 6511 establishes deadlines ("3 years from the time the return was filed or 2 years from the time the tax was paid") for administrative refund claims which must precede any court suit for tax refunds. *See* 26 U.S.C. (I.R.C.) § 7422(a).

Plaintiffs' position concerning accrual of HI claims is meritless for two reasons. First, the Federal Circuit has determined that the claims asserted in this litigation are not formal tax refund claims, *Hatter II*, 953 F.2d at 630; consequently sections 6511 and 6513(a) of the Internal Revenue Code simply have no application. Second if these tax code provisions controlled the accrual of plaintiffs' claim, the limitations period would have expired not later than April 15, 1987 (three years after the deemed return date for 1983 taxes), years before the filing date of the original complaint.

F

We next address the relation-back issue with respect to assertion of OASDI claims by the later-filing plaintiffs. As stated in Subpart VI D above, the issue with respect to OASDI taxes is whether or under what circumstances new parties may be added to a case and obtain the benefit of the original filing date. The general rule is that amendments which add new parties do not relate back. We must explore whether the later-filing plaintiffs qualify for an exception to the rule.

A recent circuit court of appeals pronouncement on amendments seeking to add parties to a complaint asserting a claim on which the controlling statute of limitations has expired is as follows:

> An amendment adding a party plaintiff relates back to the date of the original pleading only when: 1) the original complaint gave the defendant adequate notice of the claims of the newly proposed plaintiff; 2) the relation back does not unfairly prejudice the defendant; and 3) there is an identity of interests between the original and newly proposed plaintiff.

In re Syntex Corp. Securities Litigation, 95 F.3d 922, 935 (9th Cir. 1996) (citing *Besig* v. *Dolphin Boating & Swimming Club*, 683 F.2d 1271, 1278-79 (9th Cir. 1982)).

Court of Claims case law makes plain that in suits against the United States, the "identity of interests" requirement depends on representational relationships among the original and newly proposed parties, not on

merely being similarly situated with respect to the claim in the original pleading.

Here, even if it could be said that the original timely complaint gave the government adequate notice of the OASDI claims of the later-filing judges, and even if it could further be said that relation back of the OASDI claims of the later-filing plaintiffs would not unfairly prejudice the government, the later-filing judges do not share the requisite "identity of interests" with the original plaintiffs.

This issue was addressed by the Court of Claims in *Snoqualmie Tribe of Indians*, 178 Ct. Cl. at 585-89, 372 F.2d at 959-61. In that case, the Snoqualmie Tribe brought an action against the United States based upon alleged inequity in a treaty with various Indian tribes. After suit was filed, the Snoqualmie Tribe realized that the original petition should have included a claim on behalf of the Skykomish Tribe, since it appeared that the Skykomish tribe either had been a subgroup of the Snoqualmie Tribe at the time the treaty was made or had merged with the Snoqualmie Tribe thereafter through intermarriage. *Id.* at 574, 372 F.2d at 953. The Snoqualmie plaintiff sought to amend its complaint to include a claim on behalf of the by then extinct Skykomish Tribe, but the five-year limitations period had expired. *Id.* at 585, 372 F.2d at 959. Thus, the court was required to resolve whether the amendment would be allowed to relate back to the original pleading, avoiding the statute of limitations.

After first announcing the general rule that the doctrine of relation-back does not extend to amendments that add new parties, *Id.* at 588, 372 F.2d at 961, the Court of Claims found that there existed a unique

connection between the Snoqualmie Tribe and the Skykomish Tribe, the former being the "corporate representative" of the latter in that case. *Id.* at 582, 372 F.2d at 958. Thus, the court held that the Skykomish claim could relate back to the original Snoqualmie claim. *Id.* at 588-89, 372 F.2d at 961. The court reasoned that "on our theory of representation there is no new party added by amendment. The Snoqualmie Tribe is the only claimant; it is simply an entity serving in two representative capacities." *Id.* at 588, 372 F.2d at 961. The court further explained that "we would have greater difficulty allowing the amendment if we thought it was brought by an entirely unrelated party even though it arose out of the same transaction." *Id.* at 589, 372 F.2d at 961.

This requirement of representative relationship in order for an amendment adding new parties to relate back was reaffirmed by the Court of Claims in *Baldwin Park Community Hospital* v. *United States*, 231 Ct. Cl. 1011, 1982 WL 25837 (1982). In that case, an original hospital plaintiff filed an amended petition in which thirty-six hospital plaintiffs with similar claims were added several months after the original petition was filed. *Id.* 231 Ct. Cl. at 1011. (It does not appear whether a limitations period had expired in the interim, but the court treated the difference in filing dates as significant.) The defendant argued that the new plaintiffs should not enjoy the benefit of the original petition's filing date pursuant to a relation-back rule identical to RCFC 15(c). The Court of Claims found that the new plaintiffs were operated and owned either directly or through subsidiary corporations by the original plaintiff, or by a company to which the original plaintiff was the legal successor in interest. On the

basis of this representative relationship (common corporate ownership of the hospitals), the court allowed the new plaintiffs to relate their similar claims back to the original complaint's filing date. *Id.* at 1012. The requisite "identity of interests" was satisfied in that circumstance. *See generally*, *Custer* v. *United States*, 224 Ct. Cl. 140, 154-55, 622 F.2d 554, 563, *cert. denied*, 449 U.S. 1010, 101 S. Ct. 565, 66 L.Ed.2d 468 (1980) (denying relation back to original filing date by a new party alleging same claim).

Recently, this court applied Court of Claims precedent concerning the relation-back doctrine to facts similar to those in the case at bar. *Creppel* v. *United States*, 33 Fed. Cl. 590 (1995). In 1991, shortly before expiration of the six-year statute of limitations, landowners filed several related suits (consolidated by the court) alleging takings. After the limitations period had expired, the original plaintiffs moved to add 43 new plaintiffs who owned land affected by the alleged takings. The court found that, even assuming that the claims of the new plaintiffs arose out of the same transaction or occurrence that gave rise to the original complaints, there was no corporate or other legal relationship between the new and the original plaintiffs. *Creppel*, 33 Fed. Cl. at 596. The court stated:

> The identity of interest between the original and proposed new plaintiffs is limited to geographic proximity—the fact that all landowners, at the time of the alleged taking, owned property within [the affected site]. The geographic proximity of a discrete parcel of land to property owned by plaintiffs asserting a takings claim is not enough.

Id. Finding no "formal connection" between the original plaintiffs and the proposed new plaintiff, the court held that the new plaintiffs could not relate their claims back to the filing date of the original complaints. Thus, their claims were barred by the statute of limitations.

Turning to the case at bar, there is no formal connection or representational relationship among the original and the later-filing judges. In essence, each judge is suing individually for diminution of his personal compensation.

Plaintiffs' interpretation of the relation-back doctrine would allow unrelated parties, after expiration of the limitations period, to obtain the benefit of a timely filed complaint so long as the same governmental action caused their damages. Under this approach, plaintiffs with common grievances could evade the statute of limitations as a matter of course by merely adding themselves to a timely filed complaint at any time after the expiration of the statute of limitations. We do not believe that this would be consistent with congressional intent and controlling precedent dealing with statutes of limitation and relation back.

It would be anomalous if the later-filing judges in this civil action were deemed timely by application of the relation-back rule when other judges who filed a separate suit on the same day alleging an identical cause of action for diminution would be deemed untimely.

Based on the foregoing, we conclude that the OASDI claims of the later-filing judges, all first presented more than six years after first accrual, do not relate back to

the timely filing date of the original complaint and that, consequently, those claims are barred.

We address in Part VII below whether the later-filing plaintiffs' OASDI claims are continuing claims not time barred to the extent of taxes withheld after June and December 1986, the commencement months of the six-year periods preceding presentation of the First and Second Amended Complaints. (However, alternatively, even if the claims are deemed continuing claims, any portion of such claim accruing after June 1986 has been offset by salary increases, as explained in Parts IV and V above.)

VII

The next issue for resolution is whether the diminution claims are "continuing claims" so that even if some were not presented within six years of the time of first accrual, they may nonetheless be maintained with respect to damages accruing within the six-year period preceding presentation. (The issue was raised by defendant in connection with HI taxes, Def. Br. (2/25/97), p. 6 n.3, presumably because no plaintiff submitted a timely claim for HI taxes. The issue is equally applicable to OASDI claims of the later-filing plaintiffs.)

A

The continuing claim doctrine provides that when the government owes a plaintiff a continuing, recurring duty to make payments of money, a new cause of action arises with each breach of that duty. *Tabbee* v. *United States*, 30 Fed. Cl. 1, 5 (1993) and cases therein cited. *See generally Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F.2d 381 (1962), *cert. denied sub nom. Lipp* v.

United States, 373 U.S. 932, 83 S. Ct. 1540, 10 L.Ed.2d 691 (1963). *See especially Acker* v. *United States*, 23 Cl. Ct. 803, 804-06 (1991), for history and analysis of the doctrine. Under that doctrine, each incident of withholding an installment of an obligation to make continuing payments gave rise to a new claim for damages. The continuing claim doctrine prevented a statute of limitations from shielding an offender in an ongoing wrongdoing, and protected recurring claims that might otherwise be barred if based upon events occurring more than six years prior to suit.

B

However, application of the continuing claim doctrine was rejected by the Federal Circuit in *Hart* v. *United States*, 910 F.2d 815 (Fed. Cir. 1990). There the widow of a military retiree filed suit seeking to recover Survivor Benefit Plan annuity payments due after her husband's death. The suit was filed more than six years after the death of her husband, upon which date she became eligible to receive the benefits. *Id.* at 816.

Even though her suit was filed more than six years after her husband's death, plaintiff in *Hart* urged the court to apply the continuing claim doctrine. She argued that she had a new claim each month for an annuity installment payment and that her claim as to that amount "first accrued" on the first day of each month. *Id.* at 818. The Federal Circuit rejected her argument. The court reasoned that applying the continuing claim doctrine would mean that "the statute of limitations would never run in a claim such as this one, with respect to the six years of benefits preceding the filing of suit and thereafter." *Id.* The court continued: "Because all events necessary to her benefits claim had

occurred when her husband died, we conclude that plaintiff's claim for . . . annuity benefits is not a 'continuing' claim." *Id.*

The Federal Circuit reasoned: "Exceptions cannot be engrafted on the statute of limitations so as to allow claims to be asserted beyond the six year time limit set forth in Section 2501. . . . Only Congress can lengthen the time period for bringing suit against the United States." *Id.* at 817. "Congress has not chosen to extend the time limit for suits such as this one." *Id.* at 819. *See Sankey* v. *United States*, 22 Cl. Ct. 743, 746 (1991), *aff'd*, 951 F.2d 1266 (Fed. Cir. 1991) (stating, based on *Hart*, 910 F.2d 815: "this court no longer recognizes the continuing claim doctrine"); *but see Acker*, 23 Cl. Ct. at 804-06 (recognizing that the continuing claim doctrine "may be analytically suspect" and "is not readily reconciled with the wording of the statute of limitations," but holding that *Hart* "cannot be interpreted to invalidate the continuing claim doctrine" because *Hart* was not an *en banc* decision that could overrule Court of Claims precedent).

C

Likewise, in a more recent case, *Fallini* v. *United States*, 56 F.3d 1378 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1243, 116 S. Ct. 2496, 135 L.Ed.2d 189 (1996), the Federal Circuit refused to apply the continuing claim doctrine to salvage damages for the last six years of an alleged ongoing taking effected by legislation. The *Fallini* plaintiffs contended that the government had engaged, since 1971, in a continuing course of taking in violation of the Fifth Amendment by requiring them to provide water to wild horses when plaintiffs provided water to their domestic livestock on federal land. As

alleged, the takings resulted from enactment in 1971 of a statute which compelled plaintiffs to provide water to the federally-protected wild horses; plaintiffs sought recovery for alleged injuries they suffered within six years prior to the filing of their suit in 1992.

The Federal Circuit found it unnecessary to address the merits of the case, instead holding that the suit was untimely. *Id.* at 1380. The court, after stating the usual rule that "a cause of action accrues when all the events have occurred that fix the defendant's alleged liability and entitle the plaintiff to institute an action," *id.*, observed that the plaintiffs had "been cognizant of the facts underlying the alleged taking since long before they filed their complaint," since the alleged taking resulted from legislation enacted in 1971. *Id.* The court held that "for purposes of claim accrual, such a taking occurs on the date of enactment of the legislation." *Id.* at 1382-1383.[15]

D

Based on the case authority examined in this Part VII, we conclude that none of the claims asserted in this case are "continuing" claims within the meaning of the former continuing claim doctrine. On the one hand,

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[15] In its discussion of the nature of the *Fallini* plaintiffs' taking claim, the court said: "If the horses were agents or instrumentalities of the United States government, the analysis of what governmental action constituted the alleged taking *might* well be different." *Fallini*, 56 F.3d at 1383 (emphasis added). This statement would appear to have no application to claims, as in the case at bar, in which the unlawful diminution, *i.e.*, the imposition of two new taxes on sitting judges, *Hatter IV*, 64 F.3d at 652, was accomplished by discrete legislative enactments which had an immediate impact.

the unlawful diminution consisted of imposition of two new taxes on specific effective dates; on the other hand, even if plaintiffs took the position that a new claim arose with each instance of withholding of HI and OASDI taxes, the holding in *Hart*, 910 F.2d 815, would prohibit recovery for any such recurring claim not asserted within six years of the initial effective date of each new tax.

This holding has potential, alternative impact on the HI tax claims of all plaintiffs and the OASDI claims of the later-filing plaintiffs, since those claims were first presented more than six years after first accrual. Based on our conclusions in Parts IV and V above concerning offset resulting from salary increases, the claims just described would not result in recovery of damages even if they could be addressed as continuing claims.

VIII

Plaintiffs claim entitlement to compounded interest on any damages. The government objects to any award of interest and further argues that even if interest is awardable, it should be simple, not compounded. The threshold issue, then, is whether plaintiffs are entitled to recover interest on a claim under the Compensation Clause of the Constitution. All parties agree that this is an issue of first impression.

The general rule is that a successful plaintiff may not obtain interest on a claim against the United States unless Congress has expressly waived its sovereign immunity on interest by contract or statute. *Library of Congress* v. *Shaw*, 478 U.S. 310, 317, 106 S. Ct. 2957, 2962-63, 92 L.Ed.2d 250 (1986) ("In creating the Court

of Claims, Congress retained the Government's immunity from awards of interest, permitting it only where expressly agreed to under contract or statute.") *See generally* 28 U.S.C. §§ 1961 & 2516, 41 U.S.C. § 611.

A

Under existing case law, the only exceptions to this general rule pertain to awards of compensation under the Fifth Amendment takings clause.[16] That clause requires "just compensation" to one whose property has been taken by the government for public use.

The seminal case authorizing an award of interest in addition to an award for the value of property taken by the government is *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 43 S. Ct. 354, 67 L.Ed. 664 (1923). In *Seaboard*, the government took possession of private land to provide storage space for Army supplies pursuant to an Act of Congress. The Act did not authorize an award of interest. The Supreme Court stated: "Just compensation is provided for by the Constitution and the right to it cannot be taken away by the statute." *Seaboard*, 261 U.S. at 304, 43 S. Ct. at 356. The Court determined that just compensation "means substantially that the owner shall be put in as good position

[16] The Fifth Amendment of the U.S. Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V.

The requirement of 28 U.S.C. § 1498 that awards for unauthorized use of intellectual property be "reasonable and entire" has been construed to be a Congressional authorization of interest, *Waite* v. *United States*, 282 U.S. 508, 51 S. Ct. 227, 75 L.Ed. 494 (1931), and Fifth Amendment principles control application of the statute, *see ITT Corp.* v. *United States*, 17 Cl. Ct. 199, 232-33 (1989).

pecuniarily as he would have been if his property had not been taken." *Id.*

The Court approved an award of interest under these circumstances. "The only question here is whether payment at a subsequent date of the value of the land as of the date of taking . . . is sufficient to constitute just compensation." *Id.* at 305, 43 S. Ct. at 356. The Court held: "Where the United States . . . [takes land], the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking." *Id.* at 306, 43 S. Ct. at 356.

The Supreme Court has repeatedly recognized entitlement to interest in Fifth Amendment takings cases in the absence of specific congressional authorization. *See Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476, 497, 57 S. Ct. 244, 251-52, 81 L.Ed. 360 (1937) ("the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages"); *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 125, 44 S. Ct. 471, 475, 68 L.Ed. 934 (1924); *United States* v. *Rogers*, 255 U.S. 163, 168-69, 41 S. Ct. 281, 281-82, 65 L.Ed. 566 (1921).

B

The critical factor enabling a takings plaintiff to obtain interest without specific congressional allowance is that the source of the claim is the Constitution. Indeed, consistent with the general rule, the Supreme Court has held that no interest is allowed if a claimant's cause of action if founded on a "just compensation" statutory provision rather than the Constitution.

United States v. *Alcea Band of Tillamooks*, 341 U.S. 48, 71 S. Ct. 552, 95 L.Ed. 738 (1951). In *Tillamooks*, the Court denied interest on compensation awarded for taking of original Indian title by the government, where the recovery by the Indians was not grounded on the Fifth Amendment, but on a statute. *Id.* The Court stated that the no-interest rule "precludes an award of interest even though a statute should direct an award of 'just compensation' for a particular taking." *Id.* at 49, 71 S. Ct. at 552. The Court then held that "the only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment. Only in such cases does the award of compensation include interest." *Id.* (quoting *Seaboard*, 261 U.S. 299, 43 S. Ct. 354).

C

Defendant argues that the "Just Compensation Clause" of the Fifth Amendment and the "Compensation Clause" in Article III of the Constitution serve entirely different purposes and use the term "compensation" in different senses. Assuming the accuracy of this position, it is irrelevant.

Resolution of the interest issue should not turn on whether the term "compensation" means the same thing in the Just Compensation Clause as in the Compensation Clause. Rather, the common denominator is that both clauses are contained in the Constitution.

We find no principled basis to distinguish the constitutionally based entitlement to interest of takings plaintiffs from the constitutional position of federal judges. Both the Fifth Amendment and Article III affirmatively require the payment of compensation. If

recompense for delay in compensation is required for takings claimants despite the general rule, surely the federal judge whose constitutionally protected compensation is delayed is at least equally entitled to such recompense.

Indeed, for two reasons, there is a sounder basis for interest on delayed compensation protected under Article III than on just compensation guaranteed by the Fifth Amendment.

First, the language of Article III specifically requires that judicial compensation be paid "at stated Times," U.S. Const. art. III, § 1. In practical terms, how is a violation of that provision to be corrected other than by interest for the period of delay in compliance. In contrast, there is no specific language in the Fifth Amendment's takings provision concerning timing of just compensation, and entitlement to interest depends on interpretation of the term "just compensation."

Second, the primary purpose of the Compensation Clause is to maintain the independence of the federal judiciary. *United States* v. *Will*, 449 U.S. 200, 217, 101 S. Ct. 471, 481-82, 66 L.Ed.2d 392 (1980); *O'Malley* v. *Woodrough*, 307 U.S. 277, 284, 59 S. Ct. 838, 840-41, 83 L.Ed. 1289 (1939); *Hatter IV*, 64 F.3d at 649; *Atkins* v. *United States*, 214 Ct. Cl. 186, 228, 556 F.2d 1028 (1977). Denying interest on an award to compensate for its violation would plainly threaten that independence; Congress would then be free to delay indefinitely payment of the principal amount of protected compensation leaving the judges with no remedy for the delay.

D

We conclude that judges whose compensation has been diminished in violation of Article III are entitled to reasonable interest on the principal amount of such diminution.

E

Once the determination has been made in constitutional cases that interest is required or appropriate, the rate of interest, whether interest shall be simple or compounded and the frequency of compounding are matters within the broad discretion of the trial court. *See Miller* v. *United States*, 223 Ct. Cl. 352, 399-400, 620 F.2d 812, 837 (1980).

Plaintiffs have specifically requested that the 52-week Treasury bill rate compounded annually be used with respect to any damages awarded. This request is most reasonable, *cf. Hughes Aircraft Co.* v. *United States*, 31 Fed. Cl. 481, 494 (1994), *aff'd*, 86 F.3d 1566, 1575 (Fed. Cir. 1996), *vacated on other grounds*, —— U.S. ——, 117 S. Ct. 1466, 137 L.Ed.2d 680 (1997), and interest shall be awarded substantially as requested. See Part IX below for the precise expression of the interest awarded.

IX

Based on all the foregoing, it is ORDERED that:

1. Judgment in the principal amount of $328.95, plus interest from January 1, 1984 to date of payment (calculated as described below), shall be entered in favor of each of the following seven plaintiffs: (a) District Judge TERRY J. HATTER, JR.; (b) MARY MARTIN ARCENEAUX, on behalf of the late Judge George Arceneaux, Jr.; (c) District Judge PETER H. BEER; (d) DOLORES LEE BURCIAGA, executrix of the estate of District Judge Juan G. Burciaga, deceased; (e) District Judge A.J. MCNAMARA; (f) District Judge RAUL A. RAMIREZ; and (g) District Judge THOMAS A. WISEMAN, JR.

2. Judgment in the principal amount of $347.85, plus interest from January 1, 1984 to date of payment (calculated as described below), shall be entered in favor of Circuit Judge HARRY PREGERSON.

3. Judgment with respect to the remaining eight plaintiffs shall be entered in favor of the defendant.

4. Interest awarded above shall be calculated at the 52-week Treasury bill rate described in 28 U.S.C. § 1961(a). The rate during any calendar year shall be that determined for the last auction of such bills next preceding January 1 of such calendar year. Interest shall be compounded annually as of January 1 of each year.

5. Each party shall bear its own costs.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 97-5093

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., DOLORES LEE BURCIAGA, EXECUTRIX OF THE ESATE OF JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER, AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFF-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

[Aug. 5, 1999]

ORDER

Before: PLAGER, Circuit Judge, ARCHER, Senior Circuit Judge, and RADER, Circuit Judge.

PLAGER, Circuit Judge.

Terry J. Hatter, Jr., et al. appeal the damages calculation of the Court of Federal Claims, *Hatter* v. *United States*, 38 Fed. Cl. 166 (1997) (*Hatter VI*), on remand from this court's decision in *Hatter* v. *United States*, 64 F.3d 647 (Fed. Cir. 1995) (*Hatter IV*).[1] In *Hatter IV*, we held that the Compensation Clause of the United States Constitution, art. III, § 1, forbids diminishment of the compensation of Article III judges once in office and that the imposition of social security taxes on a judge's pay after taking office unconstitutionally diminishes the judge's compensation. Because the Court of Federal Claims improperly calculated the damages award due to the diminution, we reverse and remand the matter for further proceedings.

BACKGROUND

The facts of this case have been discussed in detail in our previous two decisions, *Hatter IV* and *Hatter II*. The pertinent facts are that the Hospital Insurance (HI) tax (*i.e.*, Medicare) was imposed upon federal judges for the first time on January 1, 1983, pursuant to the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 278(a), 96 Stat. 324, 559 (1982) (codified as amended at 26 U.S.C. (I.R.C.) § 3121(u) (1988)). The Old Age Survivors and Disability Insurance tax (OASDI) was first imposed upon federal judges on January 1, 1984, pursuant to the Social

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[1] The history of this case involves the following six decisions: *Hatter* v. *United States*, 21 Cl. Ct. 786 (1990) (*Hatter I*), *Hatter* v. *United States*, 953 F.2d 626 (Fed. Cir. 1992) (*Hatter II*), *Hatter* v. *United States*, 31 Fed. Cl. 436 (1994) (*Hatter III*), *Hatter* v. *United States*, 64 F.3d 647 (Fed. Cir. 995) (*Hatter IV*), *United States* v. *Hatter*, 519 U.S. 801, 117 S. Ct. 39, 136 L.Ed.2d 3 (1996) (*Hatter V*), and *Hatter* v. *United States*, 38 Fed. Cl. 166 (1997) (*Hatter VI*).

Security Amendments of 1983, Pub. L. No. 98-21, § 101(a)(1), (b)(1) and (d), 97 Stat. 65, 68, 69 (codified as amended at 26 U.S.C. (I.R.C.) § 3121(b)(5)(E) (1988) and 42 U.S.C. § 410(a)(5)(E) (1988)). The plaintiff judges asserted that their compensation was diminished in violation of the Compensation Clause, U.S. Const., art. III, § 1.

In *Hatter I*, the Court of Federal Claims dismissed the judges' claim for lack of jurisdiction, viewing it as a tax refund claim. We reversed in *Hatter II*, holding that the judges' claim was under the Compensation Clause for money damages. On remand, the Court of Federal Claims in *Hatter III* again dismissed the judges' claim, holding that there was no constitutional diminution because the taxes imposed were nondiscriminatory and generally applicable to the public. We reversed that judgment in *Hatter IV*. We held that the judges' compensation had been unconstitutionally diminished by taxes imposed after they took office and remanded the case for calculation of damages for sums improperly withheld. The Supreme Court granted certiorari; our judgment was affirmed in *Hatter V* due to lack of a quorum.[2]

On remand, the Court of Federal Claims awarded damages only to the eight original judges[3] who were

[2] The absence of a quorum resulted from recusals, presumably by Justices who could be affected by the outcome of the case. The members of the panel of this court who decided the earlier appeals and who are participating in this decision were all appointed subsequent to the events, and thus are not affected by the outcome.

[3] We follow the designation of the Court of Federal Claims, which referred to the plaintiffs filing the original complaint as the "original" judges and those who-joined or rejoined (after not

parties to the original complaint filed on December 29, 1989. Moreover, damages were limited to the amount of OASDI taxes withheld in January 1984 for services rendered in December 1983, before the period covered by the retroactive 1984 salary increase. The 1984 and subsequent pay raises of the judges were determined by the court to be more than sufficient to offset the OADSI taxes imposed in subsequent years. All other claims for damages, *i.e.*, the OASDI claim of the later-filing judges and the later-filed HI claim of all the judges, were denied.

The Court of Federal Claims determined that the continuing claim doctrine did not apply to the judges' salary payments and, as a result, the OASDI claims of the later-filing judges and the HI claims of all the judges were barred by the statute of limitations. The court also determined that, even if the continuing claim doctrine could be applied to the judges' salary payments, salary increases had more than offset any compensation diminution caused by the imposition of OASDI and HI taxes during the six-year limitations period.

DISCUSSION

As a preliminary matter, the judges assert that *Hatter VI* "did not implement [the] mandate" of *Hatter IV* because the Court of Federal Claims reconsidered

joining the appeal of *Hatter I*) the amended complaints as the "later-filing" judges.

the question of whether the social security taxes effected a diminution in salary. In *Hatter IV*, we stated:

> Social Security taxes diminish the compensation of Article III judges who took office prior to enactment of the taxes. This court therefore reverses and remands the case for tax refunds or recoveries *for the sums improperly withheld* from the claimants' salaries.

Hatter IV, 64 F.3d at 653 (emphasis added). That language is clear. We determined that a new tax on a sitting Article III judge effected an unlawful diminution of that judge's compensation. Having decided the liability question, the remand was for the purpose of ascertaining the damages for that violation, *i.e.*, "for the sums improperly withheld."

The controlling question in this appeal is whether the Government is correct that an unconstitutional diminution in the compensation of a group of judges, resulting from a tax unlawfully applied, may be fully offset by any and all future salary increases generally granted to the judiciary. The Government's position was adopted by the trial court.

We conclude that the Government's argument is fundamentally flawed, and results in a trivialization of the constitutional protection accorded judges by Article III, § 1, the Compensation Clause.[4] The consequence of

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[4] The extent of the trivialization is illustrated by the damage award made by the trial court: the judges alleged that their out-of-pocket losses from the unconstitutional imposition varied between $20,000 to $56,000, with an average of about $47,000; the trial court's judgment awarded a total of $329 to the district judges and $348 to the appellate judge, plus interest.

the Government's argument subverts the very purpose of the Compensation Clause, and is wrong, both in law and in policy.

1.

The purpose of the Constitution's Compensation Clause—federal judges shall receive "a Compensation, which shall not be diminished during their Continuance in Office"—is to protect and preserve the independence of the judiciary. This purpose, and the reasons for this salutary protection of judicial independence, are well understood and well documented. A reader unfamiliar with the literature on the subject will find a thorough introduction to the matter in the Supreme Court's seminal opinion in *Evans* v. *Gore*, 253 U.S. 245, 40 S. Ct. 550, 64 L.Ed. 887 (1920).[5]

To understand the significance of this issue, it is necessary to put it in its historical context. The Administrative Office of the U.S. Courts uses 1969 as the benchmark for measuring changes in judicial salaries; that was the year that the first Quadrennial Salary Commission's recommendations were substantially implemented by Congress and the President. The Quadrennial Salary Commission was created in an attempt to take the salaries of the judiciary, Congress, and senior executive officials out of politics, and to base salary increases for these officials on cost-of-living changes

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[5] *See also United States* v. *Will*, 449 U.S. 200, 101 S. Ct. 471, 66 L.Ed.2d 392 (1980); *O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939); *Miles* v. *Graham*, 268 U.S. 501, 45 S. Ct. 601, 69 L.Ed. 1067 (1925).

similar to those granted to General Schedule federal employees. As the history since 1969 illustrates, the attempt failed.[6]

Since 1969, with a few notable exceptions, judicial salaries have not kept pace with annual increases in inflation. Overall, measured in terms of purchasing power, judges' salaries have declined since 1969 by more than 23 percent. This did not happen as a result of actions by Congress directly reducing the compensation of judges, in which case it would have been remediable under the Constitution. Rather, it results from the political environment in which annual Congressional appropriations of funds for the judiciary occur.

For budgeting purposes, judges' salaries are tied to salaries of elected officials, including those of Congress. Because Congress rarely grants itself salary increases, the judiciary rarely receives increases, even those promised and scheduled as cost-of-living adjustments. The history of the linkage between congressional salaries and judicial salaries is long and complicated. Simply put, Title 2, U.S.C. § 135 (for district judges; similar provisions apply to the compensation of other Article III judges) ties judicial salaries to Section 205 of Title 2. Section 205, the "Adjustment Act," provides for an annual cost-of-living salary adjustment for judges, members of Congress, and Executive Schedule officials

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[6] *Atkins* v. *U.S.*, 214 Ct. Cl. 186, 556 F.2d 1028 (Ct. Cl. 1977), was an unsuccessful attempt to force the Government to address the destructive effect of inflation on the judiciary during the period 1969—1975, when the value of the dollar, measured by the Consumer Price Index, decreased by 34%, and Congress failed to provide increases to protect judges' purchasing power.

when the rates of pay of employees under the General Schedule are adjusted for inflation; the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, keyed the adjustment to the index known as the Employment Cost Index—ECI.

Congress made a valiant effort in connection with the 1989 Ethics Reform Act to play catch-up. Salaries of top government officials, and judges, which for years had been lagging behind inflation, were adjusted in the amount of 7.9% in 1990 and 29.5% in 1991. This was followed in 1992 and 1993 by the promised annual inflationary adjustments pursuant to the Adjustment Act, and as indicated by the ECI. Since then, in every fiscal year (except one, 1994), General Schedule employees have had their salaries adjusted in response to increases in the ECI; however, in every fiscal year (except one, 1998), Congress, dealing with its own political concerns, denied the promised similar adjustment to judges.

Thus, despite occasional gains, judges' salaries remain substantially behind the cost-of-living index, even taking into account the recent relatively modest increases in inflation. The issue is hardly the dollar cost of the needed adjustment in judicial salaries—the entire judiciary budget constitutes two-tenths of one percent (0.2%) of the annual budget of the Federal Government, and the salaries of Article III judges constitute only seven percent (7%) of the annual judiciary budget. Fairness to the judiciary, and the protection of its quality and independence, would come at a very small cost in dollars.

This brief review of the recent history of judicial compensation policy highlights the wisdom of the

founders in including in Article III the express provision for protection of judicial salaries. In the larger view, it behooves the Government to ensure that that protection has real meaning, since the judiciary's ability to function as an independent judiciary is a cornerstone of the people's freedom. Professor Katzmann, in his recent book, stated the point well:

> This relationship [between the federal judiciary and Congress] shapes the administration of justice in critical ways. What is at issue in part is the integrity of political institutions: the judiciary needs to function in an environment respectful of its core values and mission, with the requisite resources; and the legislative branch seeks a judicial system that faithfully interprets its laws and efficiently discharges justice. But a goal even greater than the well-being of particular branches of government is at stake: the preservation of the means by which justice is dispensed fairly and efficiently.[7]

2.

The Supreme Court has had several occasions to expound on the law of the Compensation Clause and on those occasions has established the following propositions. The imposition of a new federal tax that has the effect of reducing the judicial compensation of judges already in office is unconstitutional. *See Evans* v. *Gore*, 253 U.S. 245, 40 S. Ct. 550, 64 L.Ed. 887 (1920). However, an income tax levied against the judicial salary of judges who took office after the levy is in effect is constitutional, when the taxing measure is of general,

[7] Robert Katzmann, Courts and Congress 1 (Brookings Institution Press 1997).

non-discriminatory application to all earners of income. *See O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939). In addition, though Congress may not rescind a salary increase for judges once it has gone into effect—that would be a diminishment of compensation—Congress is under no constitutional obligation to grant salary increases. *See United States* v. *Will*, 449 U.S. 200, 101 S. Ct. 471, 66 L.Ed.2d 392 (1980); *see also Atkins* v. *United States*, 214 Ct. Cl. 186, 556 F.2d 1028 (Ct. Cl. 1977).

The question before us is one not yet presented to the Supreme Court, or previously to this court. We earlier held, consistent with *Evans*, and now law of this case, that the imposition in 1983 on federal judges then in office of entirely new taxes—the OASDI and HI taxes—is unconstitutional. The question before us now is, what is the remedy for this unconstitutional imposition, as a result of which these judges have had withheld from their judicial salaries sums of money to which they are lawfully entitled.

The theory of the Government led the trial court to declare that:

> if Congress mandates that federal judges pay a certain amount in a new tax but, at the same time, gives those judges a salary increase in an amount equal to or greater than the amount of the tax, then any diminution within the meaning of the Compensation Clause is immediately cured. This is what occurred with respect to plaintiffs.

Hatter VI, 38 Fed. Cl. at 172. The Government's theory of the case, that the judges sustained little if any damages from this unconstitutional imposition because

whatever losses they sustained were offset by later general salary increases, is fundamentally flawed.

The basic problem with the Government's theory is that it would create, with regard to judicial compensation, two different classes of judges. One class would be all judges who held office from and after 1983.[8] Those judges would be entitled the full benefit of congressionally-granted salary increases, such as they might be, awarded during their term of office. The other class would be all judges who held office prior to 1983 and continued in office for some time thereafter. These latter judges would not receive the Congressionally-granted salary increases which became effective after 1983, because a significant portion of the increases would be allocated to pay the damage award to which they are entitled as a result of the earlier unconstitutional imposition, a damage award owed them by the Government.

That is not an acceptable proposition. There is no basis on which the pre-1983 judges ought to be made to pay, from their own pockets and out of their own salaries, including generally-granted increases, the damages owed to them by the Government, when the judges who were not subject to the unconstitutional imposition are entitled to keep all of their salaries, including the increases the judiciary was awarded.[9]

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[8] For purposes of the discussion, we use the 1983 date as the significant cut-off. As will be seen in Part 3 of this opinion, for reasons related to the statute of limitations problem, that date may not be the controlling one.

[9] Of course the later-appointed judges are subject to general tax levies in effect at the time of their appointment, *see O'Malley*

The unconstitutional imposition which resulted in dollars being taken from the pre-1983 judges, dollars which were then allocated by the Government to other uses, created a specific liability upon the Government to these judges. It would be inequitable to charge these judges with the duty to pay their own damages from their own salaries, out of salary increases that Congress thereafter granted to all judges, increases unrelated to that liability. It also would be destructive of the principle that "The Judges . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const., art. III, § 1.

Congress's purpose in granting the increases received by judges in the years since 1983 is relevant to our inquiry. When the Constitutional Convention turned its attention to Article III and the issue of judicial compensation, the draftsmen first proposed that Congress would be precluded from either decreasing or increasing the compensation of judges. As the Supreme Court explained in *Will*, "Gouverneur Morris succeeded in striking the prohibition on increases; with others, he believed the Congress should be at liberty to raise salaries to meet such contingencies as inflation, a phenomenon known in that day as it is in ours." *Will*, 449 U.S. at 219, 101 S. Ct. 471.

In *The Federalist No. 79*, Alexander Hamilton explained the thinking behind this approach:

> It will readily be understood, that the fluctuations in the value of money, and in the state of

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v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939), but that is another matter entirely.

> society, rendered a fixed rate of compensation [of judges] in the Constitution inadmissible. What might be extravagant to-day might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse.

The Federalist No. 79, at 491-492 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The wisdom of our founding fathers is borne out by history; since 1969, the base date currently used by the judiciary, inflation has increased by 344% in the aggregate. In the general salary increases Congress has seen fit to grant the judiciary in the years since 1983, there is nothing to suggest that the congressional purpose was to make whole the losses sustained by the pre-1983 judges resulting from the unconstitutional imposition of the tax at issue in this case. On the contrary, everything in the record and the legislative history makes clear that these increases were in response to continued concerns expressed in Congress, within the judiciary itself, in the bar, as well as among segments of the informed public, concerns for the well-being and continued vitality of the federal judiciary if the slide in purchasing power resulting from continued and unadjusted-for inflation was not halted.[10]

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[10] *See Report of 1989 Commission on Executive, Legislative and Judicial Salaries: Hearings Before the Senate Committee on Governmental Affairs*, 101st Cong., 1st. Sess., 130 (1989).

That slide was as much a concern with regard to the pre-1983 judges who remained in service as it was with regard to those who came to the office later. To deprive the pre-1983 judges of the benefit of those increases by using them to offset the losses they incurred from the Government's earlier wrongful act would not only be unfair, but would be contrary to Congress's purpose in granting the increases. The only proper conclusion that can be reached on the facts before us is that these plaintiffs are entitled to the full measure of compensation for the damages they sustained by the wrong that was visited upon them, and that measure is independent of any generally awarded adjustment to judicial salaries.

3.

The judgment of the trial court must be reversed, and the matter must be returned to that court for determination of damages consistent with this opinion. Because a remand is necessary, there remains a disputed issue that needs resolving regarding the application of the statute of limitations. The judges argue that this case involves what is known as a "continuing wrong," so that each year in which moneys are withheld by the Government, a new cause of action arises. By this theory, no judge whose salary was or is subject to the unconstitutional imposition is barred by the six-year statute of limitations applicable to suits in the Court of Federal Claims. *See* 28 U.S.C. § 2401(a) (1994) ("[E]very civil action commenced against the United States shall be time barred unless the complaint is filed within six years after the right of action first accrues.").

The Government responds that the continuing wrong doctrine is inapplicable to this type of case, and cites

this court's opinion in *Hart* v. *United States*, 910 F.2d 815 (Fed. Cir. 1990). The Government also notes that the application of the continuing wrong theory would mean that no judge would be entitled to more than six years' worth of recovery, since any claim for years prior to that would be barred.

We agree with the Government that this is not the type of case in which the continuing wrong theory makes sense. *See Brown Park Estates—Fairfield Dev. Co.* v. *United States*, 127 F.3d 1449, 1456- 59 (Fed. Cir. 1997). The cause of action arose when the statutes which established the unconstitutional imposition became effective. Some judges "voluntarily" allowed the taxes to be taken from them year after year, in the sense that they did not protest the imposition in the only legally-effective way open to them, by a timely challenge in the courts. A judge who does not challenge the imposition by filing a complaint within the period allowed from the time the cause of action accrued is not protected from the defense of the running of the statute of limitations; like any litigant against the Government, such a plaintiff is subject to having the cause of action barred.

In this case, suit was brought not as a class action but on behalf of the individually named judges. In that regard, there are two causes of action arising under two different statutes. The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, imposed the Hospital Insurance portion of the Social Security tax on federal judges effective January 1, 1983. Since the pleadings in this case were filed on December 29, 1989, just short of seven years after the cause of action arose, all claims under that Act are subject to being barred by

the running of the statute of limitations. The Old Age and Survivors Disability Insurance portion of the Social Security tax was imposed on federal judges by the Social Security Amendments of 1983, Pub. L. No. 98-21, and was effective January 1, 1984. Since this suit was filed by the original ten judges a few days short of six years from when that cause of action arose, the suit on that claim is not barred.

The rather convoluted accounting the trial judge found himself enmeshed in because of the theory of the case that was adopted in the trial court is wholly irrelevant; therefore we express no opinion thereon.

CONCLUSION

The judgment of the Court of Federal Claims is reversed, and the matter remanded to that court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 94-5139

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER, AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFF-APPELLANTS

v.

THE UNITED STATES, DEFENDANT-APPELLEE

ORDER

Each party has filed a combined petition for panel rehearing and petition for rehearing en banc.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) Both petitions for panel rehearing are denied.

(2) The petition for rehearing en banc of the Appellants is granted.

(3) The petition for rehearing en banc of the Appellee is denied.

(4) The judgment of the court entered on August 5, 1999, and reported in 185 F.3d 1356 (Fed. Cir. 1999), is vacated and the opinion of the court accompanying the judgment is withdrawn with respect to part 3.

(5) Additional briefing and argument are not indicated at this time.

FOR THE COURT,

December 20, 1999
Date

/s/ JAN HORBALY
JAN HORBALY
Clerk

APPENDIX K

1. The Compensation Clause of Article III, Section 1, of the United States Constitution provides that "[t]he Judges both of the supreme and inferior courts, * * * shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

2. Section 3101 of Title 26, United States Code, provides, in part:

(a) Old-age, survivors, disability insurance

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentage of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

(b) Hospital insurance

In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentage of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) * * *

3. Section 3121 of Title 26, United States Code, provides in part:

(b) Employment

For purpose of this chapter, the term "employment" means any service, of whatever nature, performed * * * ; except that such term shall not include—* * *

(5) service performed in the employ of the United States or any instrumentality of the United States * * * except that this paragraph shall not apply with respect to any such service performed on or after any date on which such individual performs—* * *

(E) service performed as the Chief Justice of the United States, an Associate Justice of the Supreme Court, a judge of a United States court of appeals, a judge of a United States district court (including the district court of a territory), a judge of the United States Court of Federal Claims, a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States magistrate, or a referee in bankruptcy or United States bankruptcy judge[.]

* * * * *

(u) Application of hospital insurance tax to Federal, State, and local employment

(1) Federal employment

For purposes of the taxes imposed by sections 3101(b) and 3111(b), subsection (b) shall be applied without regard to paragraph (5) thereof.

APPENDIX L

The following is a list of other actions that have been filed against the United States in the Court of Federal Claims, challenging thte constitutionality of the extension of the HI or OASDI tax to federal judges' salaries, as well as a list of the plaintiffs to those actions:

Anderson v. *United States*, No. 95-856

Plaintiffs:
G. Ross Anderson, Jr.
Richard A. Enslen
Gerald W. Heaney
Douglas W. Hillman
William C. Lee
Theodore McMillan
James T. Moody
John T. Nixon
Allen Sharp
Thomas R. Brett
William J. Castagne
Stuart Daly, on behalf of T.F. Gilroy Daly
A. Joe Fish
Betty J. Fletcher
J. Owen Forrester
John M. Manos
Consuelo B. Marshall
Neal P. McCurn
Thomas J. Meskill
Stewart A. Newblatt
James C. Paine
Manuel L. Real
Stephen Reinhardt
David L. Russell
Frank Howell Sealy
Joseph E. Stevens, Jr.
Robert W. Sweet

Anna Diggs Taylor
Filemon B. Vela
C. Rogert Vinson
Lee R. West
David K. Winder
Rya W. Zobel
Davis N. Edelstein
Warren W. Eginton
Sherman G. Finesilver
Eugene H. Nickerson
Barbara Jacobs Rothstein
Charles P. Sifton
Leonard D. Wexler
William A. Norris
William O. Bertelsman
Clarence A. Brimmer
W. Earl Britt
Ellen Bree Burns
Peter C. Dorsey
Sam J. Ervin, III
Gerard L. Goettel
J. Dickerson Phillips, Jr.
Thomas C. Platt, Jr.
H. Lee Sarokin
Eugene E. Siler, Jr.
Harold A. Ackerman
Norman W. Black
Harry T. Edwards
Orinda D. Evans
C. Weston Houck
Patricia M. Wald
Thomas G. Hull
Francis G. Murnaghan, Jr.
James A. Redden
John W. Bissell

Carman v. *United States*, No. 95-809T

Plaintiff: Gregory W. Carman

Cerezo v. *United States*, No. 96-300C

Plaintiffs: Carmen C. Cerezo
Juan M. Perez-Gimenez
Hector M. Laffitte

Garcia v. *United States*, No. 96-215

Plaintiffs: H.F. Garcia
James R. Nowlin
Lucius D. Bunton, III

Grady v. *United States*, No. 96-127

Plaintiffs: John F. Grady
James B. Moran
Milton I. Shadur
John A. Nordberg
Marvin E. Aspen
Charles P. Kocoras
Paul E. Plunkett

Henderson v. *United States*, No. 95-856

Plaintiffs: Thelton E. Henderson
Robert P. Aguilar

Kearse v. *United States*, No. 96-426

Plaintiff: Amalya L. Kearse

Newman v. *United States*, No. 97-519C

Plaintiffs: Jon O. Newman
Robert G. Doumar
David D. Dowd, Jr.
Thomas P. Griesa
Hayden W. Head, Jr.
George P. Kazen

Rambo v. *United States*, No. 96-380

Plaintiff: Sylvia H. Rambo

Wicker v. *United States*, No. 96-420

Plaintiff: Thomas C. Wicker, as executor of estate of Veronica D. Wicker